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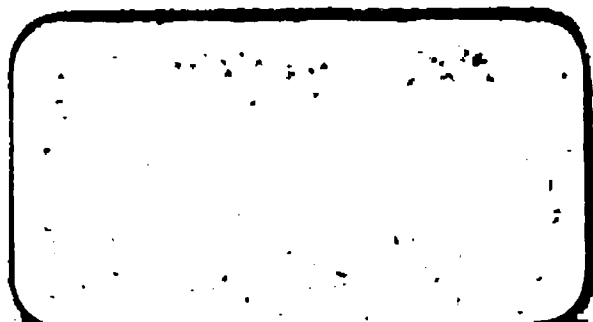
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THE
NEW PRACTICE
OF
THE COMMON LAW.

BY J. PATERSON, M.A., H. MACNAMARA,
AND W. MARSHALL, ESQRS.,
BARRISTERS-AT-LAW.

VOL. II.



LAW TIMES OFFICE:
29, ESSEX STREET, STRAND, LONDON.

1857.

LONDON:
PRINTED BY JOHN CROCKFORD, 29, EMBURY STREET,
STRAND.

THE
COMPLETE PRACTICE
OF THE
LAW OF ENGLAND,

AS ESTABLISHED BY THE
RECENT STATUTES, ORDERS, RULES, &c.

VOL. V.

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P R E F A C E.

THIS work was commenced soon after the numerous and important changes in the practice of the Superior Courts, which had been effected by the Common Law Procedure Acts, and the Rules of Court framed under them. Several statutes and rules as well as decisions having appeared since the earlier parts were published, it has been found necessary to notice a few alterations and additions in a supplementary chapter of *Addenda*. These alterations, however, have been embodied in the Index, and all the authorities have been brought up to the present time.

The object of the Authors was to produce a work clear, short, and useful, and confined as much as possible to the practice as it now is. This result has been sought to be chiefly attained by a proper arrangement of the matter, and by entirely omitting all the obsolete branches of practice, or retaining only so much of the former practice as remains part of the new, whether under the same or a different name. Superfluous comments have been avoided, and in general the

words themselves of the new statutes and rules have, for the sake of brevity and precision, been incorporated into the text. Though it is believed no material authorities will be found to be omitted in the references, yet where a long series of cases illustrates only one point of practice now well settled, and the reports of the latest cases contain the prior references, the latest report only is cited, instead of encumbering the notes with the whole series.

A Table has been added of the pages of the Work where the sections of the Common Law Procedure Acts, and the Rules of Court are to be found quoted and referred to.

The selection of Forms has been chiefly regulated by the known wants of those engaged in ordinary practice.

The arrangement of the chapters is believed to be that which is most intelligible and convenient. The First Part contains in their natural order the more usual steps in an ordinary action. The Second Part contains in nearly the same order the variations of the same outline, produced by the character, situation, and conduct of the parties. The Third Part contains the summary, appellate, and peculiar procedure of the courts.

The Authors hope that, though the great labour and care bestowed on this work will scarcely be accepted as any apology for its defects, the Profession will receive with some indulgence an attempt to compress

the entire practice of the Common Law into a compact form, without omitting anything needful in the exigencies of everyday business.

In conclusion, it is only necessary to state for what portions of the Work the Authors respectively are responsible. These are as follows :—

Mr. Paterson : 1—79 ; 212—524 ; 627—930 ; 996—1182 ; 1199 to the end.

Mr. Macnamara : 81—211.

Mr. Marshall : 525—626 ; 931—995 ; 1183—1198.

TEMPLE,

February, 1857.

PART II.

THE PRACTICE

OF THE

SUPERIOR COURTS OF COMMON LAW.

CHAPTER XXIV.

JUDGMENT AFTER VERDICT.⁽¹⁾

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| <ol style="list-style-type: none"> 1. Signing judgment. 2. When. 3. When and how entered on roll. 4. Form of judgment. 5. Registering judgments. | | <ol style="list-style-type: none"> (b) In Palatine Counties. 6. Effect of judgment. (a) On lands. (b) On stocks, &c. 7. Interest on judgments. |
| <ol style="list-style-type: none"> (a) In Middlesex and Yorkshire. | | |
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1. *Signing judgment.*—Judgment after a verdict is said to be signed, when the costs are taxed and inserted in the Master's book;⁽²⁾ and these operations are in fact generally simultaneous. Final judgment is complete at the time of signing it.⁽³⁾ And where judgment is signed for want of a plea, it is complete at the time of signing it, though the costs are not taxed.⁽⁴⁾ No execution can issue until the judgment is signed,⁽⁵⁾ except in feigned issues from a court of equity, as to which it is not usual to sign judgment. The mode of signing judgment is as follows. The party entitled to the *prostea* goes to the Associate, and gets the *Nisi Prius*

⁽¹⁾ For judgment in other cases, see the various heads to which it belongs, as "*Démurres*," "*Judgment by Default*," &c.

⁽²⁾ *Butler v. Bulkeley*, 8 Moore, 104, 1 Bing. 233; *Robieson v. Rees*, 1 L. M. & P. 69; *Peirce v. Derry*, 4 Q. B. 635.

⁽³⁾ *Colbron v. Hall*, 5 Dowl. 534; *Fisher v. Dudding*, 9 Dowl. 872; 3 Scott N. R. 516.

⁽⁴⁾ *Walter v. De Richemont*, 6 Q. B. 544.

⁽⁵⁾ *Finch v. Brook*, 5 Dowl. 59.

record. If the cause was tried at the assizes, and the *postea* is therefore not engrossed by the Associate on the back of the record, the party must so engross it, and take it to the office of the court to be stamped. He gives one day's notice of taxation to the other party, where notice is necessary, and on the day appointed takes the *postea* along with his affidavit of increased costs to the Master, who will tax the costs, and at the same time sign judgment under the *postea*.⁽¹⁾

Though the taxation of costs is generally simultaneous with signing judgment, yet the attorney may, if he pleases, sign judgment without taxing the costs, in which case, it seems, he will waive them;⁽²⁾ and hence the judgment cannot be set aside, even where the costs are taxed, without giving notice to the other side, the only remedy being a review of the taxation, if there are overcharges.⁽³⁾ If the judgment is irregularly signed, the same party who signed it may obtain a rule to set it aside, and sign it anew, which is a rule *nisi* only in the first instance.⁽⁴⁾

A pauper plaintiff is entitled to sign judgment without paying any fees, whether he has obtained a verdict exceeding 5*l.* or not.⁽⁵⁾

2. *When signed.*]—No rule for judgment is necessary.⁽⁶⁾ "When a plaintiff or defendant has obtained a verdict in term, or in case a plaintiff has been nonsuited at the trial in or out of term, judgment may be signed and execution

(1) The party must in addition take to the Master an *incipitur* of the declaration made on paper, which is called the judgment paper, on which the Master signs judgment as well as on the "*postea*."—C. L. P. Act, 1852, s. 206, *post*, 509, 510. The following is the

Form of Incipitur, with Judgment signed in the Exchequer.

In the Exchequer of Pleas.

Judgment on *Postea*, for £

The day of 18 .
 — to wit. } A. B., the plaintiff in this suit, complains of C. D., the
 } defendant in this suit, who has been summoned to
 answer the plaintiff in an action on the case. For that, whereas, &c.

Judgment signed 6th February,

Costs, £

Where the *incipitur* varies from the judgment roll, see *King v. Birch*, 3 Q. B. 425.

(1) *Field v. Partridge*, 7 Exch. 689.

(2) *Ibid*; see *ante*, p. 500.

(3) *Bennett v. Simmons*, 2 D. & L. 98.

(4) Rule Pr. 121, H. T. 1853.

(5) Rule Pr. 55, H. T. 1853.

issued thereon in fourteen days, unless the judge who tries the cause or some other judge, or the court, shall order execution to issue at an earlier or later period, with or without terms."⁽¹⁾ Where the judge certifies on the back of the record for speedy execution under 1 Will. 4, c. 7, s. 2, judgment may be signed, and costs taxed the day after the trial; and so if the judge or the court order execution to issue forthwith under the above rule, and the Common Law Procedure Act, 1852, s. 120. If there is good ground for moving for a new trial, the proper course is to apply to the judge at the trial, or to a judge at chambers, to stay the execution until such new trial may be moved for, and if judgment has not been previously signed, the motion for a new trial stays judgment or execution, until it is disposed of.⁽²⁾ But in all cases, whether judgment has been signed and execution has issued forthwith, or within fourteen or any other number of days, the right of the party to move for a new trial, or arrest of judgment, or judgment *non obstante veredicto*, within four days after the verdict, or within the term, if the trial took place during term, or within the first four days of the ensuing term, if the trial took place during vacation, is not affected by the issuing of execution; and if any of these motions is successful, the judgment will be vacated and execution set aside, and the party restored to all that he may have lost thereby.⁽³⁾

The party entitled to sign judgment may postpone doing so as long as he pleases, but in some cases the opposite party may compel it.⁽⁴⁾ And "the death of either party between the verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after such judgment."⁽⁵⁾ A month's notice previous to signing judgment, where no proceedings have been had for a year, seems unnecessary, as the rule of court⁽⁶⁾ applies only to proceedings before verdict.⁽⁷⁾

3. *When and how entered on the roll.*—“It shall not be necessary, before issuing execution upon any judgment under the authority of the Common Law Procedure Act,

⁽¹⁾ Rule Pr. 57, H. T. 1853.

⁽²⁾ See *ante*, p. 394.

⁽³⁾ 1 Will. 4, c. 7, s. 2; Rule Pr. 50, H. T. 1853.

⁽⁴⁾ *Taylor v. Nesfield*, 4 E. & B. 432; *ante*, p. 443.

⁽⁵⁾ C. L. P. Act, 1852, s. 139. See *post*, "Death of Party."

⁽⁶⁾ Rule Pr. 176, H. T. 1853; *ante*, p. 40.

⁽⁷⁾ *May v. Wooding*, 3 M. & Sel. 500.

1852, to enter the proceedings upon any roll, but an *incipitur* thereof may be made upon paper, shortly describing the nature of the judgment according to the practice heretofore used, and judgment may thereupon be signed and costs taxed, and execution, issued according to the practice heretofore used; provided, nevertheless, that the proceedings may be entered upon the roll, whenever the same may become necessary for the purpose of evidence or of bringing error or the like" (s. 206). "It shall not be necessary, before issuing execution upon any judgment whatever, to enter the proceedings upon any roll."⁽¹⁾ The judgment may be entered on the roll at any time.⁽²⁾ But the opposite party may, if injured by the delay, compel it by a judge's order;⁽³⁾ or a third party may, if the plaintiff acts in bad faith.⁽⁴⁾ The order of the judge will be made upon the party and not his attorney.⁽⁵⁾ "Every declaration and other pleading shall be entered on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the court or a judge."⁽⁶⁾ "All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the court or a judge to order a judgment to be entered *nunc pro tunc*."⁽⁷⁾ "No entry or continuances by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings."⁽⁸⁾ The judgment roll consists of a transcript of the Nisi Prius record, inclusive of the postea and judgment. The issue is first engrossed on the roll, which is the duty of the plaintiff, and the successful party then completes it, and takes it to the Master along with the Nisi Prius record with postea indorsed, and the Master's allocatur, when the clerk will enter the proceedings.⁽⁹⁾

⁽¹⁾ Rule Pr. 70, H. T. 1853.

⁽²⁾ *Barrow v. Croft*, 4 B. & C. 388.

⁽³⁾ *Hopkins v. Francis*, 2 D. & L. 664; 13 M. & W. 668; *Newton v. Boodle*, 5 C. B. 206.

⁽⁴⁾ *Chubb v. Burrell*, 25 L. T. 98.

⁽⁵⁾ *Engler v. Twisden*, 4 Bing. N. C. 714; 6 Scott 580.

⁽⁶⁾ C. L. P. Act, 1852, s. 54.

⁽⁷⁾ Rule Pr. 56, H. T. 1853; Rule Pl. 32, T. T. 1853.

⁽⁸⁾ Rule Pr. 31, H. T. 1853.

⁽⁹⁾ See *Newton v. Boodle*, 5 C. B. 206.

Judgment nunc pro tunc.]—It is competent for the court in some instances to order judgment to be entered up *nunc pro tunc*; but in all such cases the delay in signing judgment must have arisen from the act of the court, and not the neglect of the party.⁽¹⁾

4. *Form of judgment.*]—The form of judgment used to vary according to the particular form of action; but “now in all actions, where the plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of a debt or damages.”⁽²⁾ “But nothing in this act contained shall in any way affect the provisions of 8 & 9 Will. 3, c. 11, intituled ‘An Act for better preventing frivolous and vexatious suits,’ as to the assignment or suggestion of breaches, or as to judgment for a penalty as a security for damages in respect of further breaches.”⁽³⁾ The costs assessed by the jury ought to be included in the entry; and if the costs of increase are stated to be assessed by the jury instead of by the court, there will be ground of error.⁽⁴⁾ The schedule to the Rules Pr. H. T. 1853, contains the first two of the following forms:—

(1.) *Form of a Judgment for Plaintiff on a Verdict in a Town Cause.*

(*Copy the Nisi Prius record and then proceed thus*):—Afterwards on the day of in the year of our Lord (*day of signing final judgment*) come the parties aforesaid by their respective attorneys aforesaid (*or as the case may be, if they have not appeared by attorneys*), and the Right Honourable John Lord Campbell, Her Majesty’s chief justice assigned to hold pleas in the court of our Lady the Queen, before the Queen herself, [*or if in Common Pleas,* “the Right Honourable Sir John Jervis, knight, Her Majesty’s chief justice assigned to hold pleas in Her Majesty’s Court of the Bench,” *or if in the Exchequer,* “the Right Honourable Sir Frederick Pollock, knight, chief baron of Her Majesty’s Court of Exchequer,” *or Sir , knight, one of her Majesty’s justices of her court of* (*as the case may be*) before whom the said issue was (*or “issues were”*) tried in the absence of Her Majesty’s chief justice, &c.” (*as the*

⁽¹⁾ *Freeman v. Tranah*, 12 C. B. 411; *Miles v. Williams*, 9 Q. B. 47; *Heathcote v. Wynn*, 25 L. T. 247.

⁽²⁾ C. L. P. Act, 1852, s. 95.

⁽³⁾ *Ibid.* s. 96. See post, “Writ of Inquiry.”

⁽⁴⁾ 2 Hulloek, 650. See *Guest v. Elwes*, 5 A. & E. 127.

case may be)] hath sent hither his record had before him in these words : Afterwards (&c. *copy the postea.*) Therefore it is considered that the plaintiff do recover against the defendant the said moneys by the jurors aforesaid in form aforesaid assessed [*or if the action be in debt, and the jury do not assess the debt, but only the damages and forty shillings costs*, then say, "do recover against the defendant the said debt of £ , and the moneys by the jurors aforesaid in form aforesaid assessed,"] and also £ for his costs of suit by the court here adjudged of increase to the plaintiff, which said moneys and costs [*or debt, damages, and costs*] in the whole amount to £ .
 [In the margin of the roll opposite the words "therefore it is considered" write "judgment signed the day of A. D. " stating the day of signing the judgment.]

(2.) *The like, in a Cause tried at the Assizes.*

(*Copy the Nisi Prius record and then proceed thus*) : Afterwards on the day of , in the year of our Lord (*day of signing final judgment*) come the parties aforesaid by their respective attorneys aforesaid, (*or as the case may be*), and Sir , knight, and Sir , knight, justices of our Lady the Queen, assigned to take the assizes in and for the said county (*or "city and county," &c. as the case may be*), before whom the said issue was [*or "issues were"*] tried; have sent hither their record had before them in these words : Afterwards [*&c. conclude as directed in the preceding form.*]

(3.) *Form of Judgment for Plaintiff, on one Count, for Defendant on another Count, and nolle prosequi as to a third Count.*

But because the jurors aforesaid have not assessed any damages on occasion of the said premises in the last count of the declaration mentioned, the plaintiff saith, that he will not further prosecute his suit in that behalf against the defendant. And hereupon the plaintiff prays the judgment of the court upon the premises in the first count of the declaration mentioned. Therefore it is considered by the court here that the plaintiff do recover against the defendant the said moneys (&c. *as in No. 1.*) And as to the premises in the second count of the declaration mentioned, let the defendant be acquitted, and go thereof without day.

(4.) *Form of Judgment for Plaintiff where Defendant's Costs of Issues exceed Plaintiff's Costs.*

[*Previous part as before.*—And because the defendant's costs of the said issues so found for the defendant by the said verdict as aforesaid exceed the plaintiff's costs of suit by £ . Therefore it is considered, that the defendant do recover against the plaintiff the said £ for his said costs of those issues.

(5.) *Ditto, where there are Issues in Fact tried before Issues of Law, and Plaintiff succeeds at the Trial, but fails on the Demurrer.*

Whereupon all and singular the premises aforesaid, whereof the parties have put themselves upon the judgment of the court, being seen, and by the court here fully understood, and mature deliberation being thereupon had, it appears to the court here, that the said plea of the defendant by him [secondly] within pleaded is good in substance. Therefore it is considered, that the plaintiff take nothing by his said writ, and that the defendant go thereof without day.

(6.) *Form of Judgment for Defendant.*

Therefore it is considered that the plaintiff take nothing by his said writ, and that the defendant do recover against the plaintiff £ for his costs and charges by him about his defence expended.—(*Insert marginal note as in No. 1.*)

The same is the form in nonsuit, and where a juror is withdrawn.

5. *Registering judgment.*]—By 1 & 2 Vict. c. 110, s. 19, no judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy shall by virtue of this act affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court, and the title of the cause or matter, in which such judgment, decree, order, or rule shall have been obtained or made, and the date of such judgment, decree, order, or rule, and the account (i.e. amount) of the debt, damages, costs, or moneys, thereby recovered or ordered to be paid, shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order, or rule; and such officer shall be entitled for such entry to the sum of five shillings; and all persons shall be at liberty to search the same book, on payment of the sum of one shilling.⁽¹⁾ By 3 & 4 Vict. c. 82, s. 2, after reciting that

(¹) Where the defendant has been taken in execution after the memorandum has been left and the particulars entered, the court will order the plaintiff's attorney, on payment of his costs, to attend the Master and make an entry, that the defendant had been so taken under

certain doubts had been entertained, whether a purchaser would be affected with notice, notwithstanding the above memorandum, provided, that no such judgment, decree, order, or rule, as aforesaid, shall by virtue of the said act affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned, shall have been left with the senior Master of the said Court of Common Pleas, any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in anywise notwithstanding. Previous to the stat. 2 & 3 Vict. c. 11, all judgments required to be docketed under 4 & 5 Will. 3, c. 20, and 7 & 8 Will. 3, c. 36, so as to affect purchasers; but that practice was abolished, and all docketed judgments were directed to be thenceforth registered under the above stat. 1 & 2 Vict. c. 110, s. 19. The stat. 2 & 3 Vict. c. 11, s. 2, also provided, that, in addition to the entry by 1 & 2 Vict. c. 110, and by this act required to be made, in a book by the senior Master of the particulars to be contained in every memorandum or minute left with him of any judgment, decree or order, rule or order, he shall insert in such book the year and the day of the month, when every such memorandum or minute is so left with him. The same statute (sect. 4) made judgments, though registered under 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11, void after five years from registration as against purchasers, mortgagees, and creditors, unless a fresh register be made within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years. The 5th section provided, that as against purchasers without notice of the judgment, &c., such judgment shall not bind or affect such lands, or any interest therein, further or otherwise, or more extensively in any respect, although duly registered, than a judgment could have done before 1 & 2 Vict. c. 110.

The 18 & 19 Vict. c. 15, s. 4, after reciting that, whereas the protection afforded to purchasers, mortgagees, and credi-

the *ca. sa.*; *Lewis v. Dyson*, 1 Bail C. C. 33. But the court of C. P. has no jurisdiction over the Master as to compelling him to make an entry; the only mode of so compelling him, it seems, would be by mandamus: *Ex parte Ness*, 5 C. B. 155; 5 D. & L. 339.

tors by 3 & 4 Vict. c. 82, against judgments, decrees, orders, or rules not duly registered, is confined to judgments, decrees, orders, or rules binding by virtue of 1 & 2 Vict. c. 110: and whereas the docket or register previously in use has been closed, and the said provision ought not to be so restricted, enacts:—

That no judgment, decree, order, or rule which might be registered under 1 & 2 Vict. c. 110, shall affect any lands, tenements, or hereditaments, at law or in equity, as to purchasers, mortgagees, or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned shall have been left with the proper officer of the proper court, any notice of any such judgment, decree, order, or rule to any such purchaser, mortgagee, or creditor in anywise notwithstanding.

Sections 5 and 6 also enact:—

And whereas it is expedient that certain doubts, which have arisen upon some of the provisions for the protection of purchasers against judgments in the said acts contained, should be removed, be it therefore declared and enacted as follows:—The provision contained in sect. 2 of the said 3 & 4 Vict. c. 82, extends and shall be deemed to extend as well to the act therein referred to as to sect. 4 of the said 1 & 2 Vict. c. 110, as explained by this act, so that notice of any judgment, decree, order, or rule not duly re-registered shall not avail against purchasers, mortgagees, or creditors as to lands, tenements or hereditaments.

Where, by the said act 2 & 3 Vict. c. 11, re-registry of judgments, decrees, orders, or rules is required within such period of five years as is therein mentioned, in order to bind purchasers, mortgagees, and creditors, it shall be deemed sufficient to bind such purchasers, mortgagees, and creditors, if such a memorandum or minute as was required in the first instance is again left with the senior Master of the Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument, vesting or transferring the legal or equitable right, title, estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditors accrued, as directed by the said last-mentioned act, although more than five years shall have expired by effluxion of time since the last previous registration before such last-mentioned memorandum or minute was left, and so *toties quoties* upon every re-registry.

Section 8, following the 2 & 3 Vict. c. 11, s. 6, enacts:—

Nothing herein contained shall extend to revive or restore any judgment which shall be extinguished or barred, or to affect or prejudice any such judgment, or any decree, order, or rule as between the parties thereto, or their representatives, or those deriving as volunteers under them.

Section 13 enacts:—

The searches of the several registers, by the said recited acts, or by

this act authorized to be made for the sum of 1s., may be made by the parties themselves, under proper regulations in the office, and the sum of 1s. only shall be payable on one search, although more names than one shall be searched for, where such names relate to the same purchase, mortgage, or other transaction.

(a) *Registering in Middlesex and Yorkshire.*—Various statutes establish a registry of judgments in Middlesex and Yorkshire,⁽¹⁾ and, upon filing a memorial of the judgment in the registry of such counties respectively, any lands situated within the same may be affected; and a judgment registered under 1 & 2 Vict. c. 110, cannot affect lands in Middlesex, unless also registered under 7 Anne, c. 20, s. 18.⁽²⁾

The memorial is engrossed on parchment, stamped with a half-crown stamp, and containing a certificate of judgment being signed. The form may be obtained at a law stationers. This is taken to the Master with the postea, allocatur, and judgment paper, when he will sign the certificate. An affidavit of such signature, stamped with a half-crown stamp, is then written on the memorial and sworn before a judge of the court in which the judgment was signed. The memorial is then taken and filed with the registrar, at the office in Bell Yard, Temple Bar, for the county of Middlesex, or at the local registries in the three Ridings of Yorkshire respectively.

Form of Memorial.

A memorial to be registered pursuant to the statute, &c., of a judgment of Her Majesty's Court of Queen's Bench, [or "C. P." or "Exch. of Pleas,"] of the day of 18 , for A. B., in an action between A. B., plaintiff, and C. D., defendant, for £ , besides costs of increase and for costs of increase, £ ; in all, £ .
Roll

Affidavit of Signature of Master.

I, P. A., of , make oath and say that I saw , Esq., one of the Masters of the Court of Queen's Bench ["C. P." or "Exch. of Pleas"] sign the certificate of the judgment in the memorial above-mentioned.

Sworn, &c.

P. A.

(1) 5 Anne, c. 18, s. 4; 6 Anne, c. 35, s. 19; 7 Anne, c. 20, s. 18; 8 Geo. 2, c. 6, ss. 1, 18.

(2) *Westbrook v. Blythe*, 3 E. & B. 737; *Hughes v. Lumley*, 4 E. & B. 274.

(b) *Registering judgments in the Palatine Counties.*—The statute 18 & 19 Vict. c. 15, extends the provisions of the acts 1 & 2 Vict. c. 110, 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82, to the counties palatine. Section 1st provides, that any judgment of the Court of Common Pleas of Lancaster, or of the Court of Pleas of Durham, obtained before 1 & 2 Vict. c. 110, and not already registered in the said courts respectively under the provisions of the same act, or not registered under this act on or before Nov. 1, 1855, shall not, after that day, affect any lands, tenements, or hereditaments in the said counties palatine respectively, as to purchasers, mortgagees, or creditors, unless and until such memorandum or minute of such judgment, as is in the said act prescribed, shall be left with the prothonotary of the court in which the judgment has been obtained, who shall, forthwith, enter the same in manner by the same act, as amended by this act, directed in regard to judgments thereby authorized to be registered, and shall be entitled for every such entry to the sum of 2s. 6d., and the provision for re-registration *toties quoties* hereinafter mentioned,⁽¹⁾ as explained by this act, is hereby extended and applied *mutatis mutandis* to judgments registered under this present provision. The 2nd section extends the provisions of 1 & 2 Vict. c. 110, ss. 18, 19, and 20, to the counties palatine, and then provides, that no judgment, decree, order, or rule of any court shall bind lands, tenements, and hereditaments in the said counties palatine respectively, as against purchasers, mortgagees, or creditors, unless and until such memorandum or minute thereof, as hereinbefore is mentioned, shall be left with the prothonotary of the Palatine Court in which are situated the lands, tenements, and hereditaments intended to be charged thereby. The 3rd section then extends to the counties palatine the 2 & 3 Vict. c. 11, ss. 3, 4, 5, and 7, and also the 3 & 4 Vict. c. 82, s. 2, respecting the particulars to be inserted in the register by the Master, and respecting the re-registration of judgments, decrees, or orders and rules, and respecting the registration and re-registration of *lis pendens*, and respecting the protection of purchasers, mortgagees, and creditors, as explained or amended by this act. The 4th section provides, that the prothonotary, or deputy prothonotary, or other officer of the county palatine appointed for the purpose, shall perform all the duties done by the senior Master of the Common

(¹) See *ante*, p. 515.

Pleas at Westminster; that he shall be entitled to 2s. 6d. for registration, and 1s. for re-registration, and that any person may search all the books for 1s.

6. *Effect of Judgment*:—

(a) *Effect of the judgment on lands, &c.*—The statute 1 & 2 Vict. c. 110, s. 13, enacts:—

That a judgment entered up against any person in the Courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure), of, or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act or any part thereof, as he would be entitled to in case the person, against whom such judgment shall have been so entered up, had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt, and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge, until after the expiration of one year from the time of entering up such judgment, or in cases of judgments already entered up, or to be entered up before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: provided also, that, as regards purchasers, mortgagees, or creditors who shall have become such before the commencement of this act, such judgment shall not affect lands, tenements, or hereditaments otherwise than as the same would have been affected by such judgment if this act had not passed: provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice.

These provisions take effect only after registration, as to which see *ante*, p. 513. A judgment duly registered is a charge on the benefice of the debtor, and the creditor is entitled to have a receiver appointed.⁽¹⁾

The lien created by the judgment is not waived by an action being brought on the judgment.⁽²⁾

(b) *Lien of judgments on Government and other stocks.*—By 1 & 2 Vict. c. 110, s. 14, it is enacted, that if any person, against whom any judgment shall have been entered up in any of the superior courts, shall have any Government stock, funds, or annuities, or any stock, or shares of, or in any public company in England (whether incorporated or not), standing in his name, in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them, or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to, if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order.

The 3 & 4 Vict. c. 82, s. 1, enacted:—

That the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities, or shares as aforesaid, as also in the dividends, interest, or annual produce of any such stock, funds, annuities, or shares, and whenever any such judgment debtor shall have any estate, right, title, or interest, vested or contingent, in possession, remainder, or reversion, in, to, or out of any such stocks, funds, annuities, or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant-General of the Court of Chancery, or the Accountant-General of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stocks, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such

⁽¹⁾ *Hawkins v. Gathercole*, 1 Sim. N. S. 63.

⁽²⁾ *Erby v. Erby*, 1 Salk. 80.

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judgment debtor: provided always, that no order of any judge as to any stocks, funds, annuities or shares standing in the name of the Accountant-General of the Court of Chancery, or of the Court of Exchequer, or as to the interest, dividends, or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities, or shares, or payment of the interests, dividends, or annual produce thereof, in such manner as the Court of Chancery, or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stocks, funds, annuities, or shares, or the interest, dividends, or annual produce thereof, in favour of the judgment creditor with the amount of the sum to be mentioned in any such order.

In order to prevent the debtor transferring the stock, the 2nd section enacts :—

That every order of a judge charging any Government stock, funds, or annuities, or any stock, or shares in any public company, under this act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only ; and such order, if any Government stock, funds, or annuities, standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the Governor and Company of the Bank of England from permitting a transfer of such stock in the mean time, and until such order shall be made absolute or discharged, and if any stock or shares of or in any public company, standing in the name of the judgment debtor, in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall, in like manner, restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person, or persons shall permit any such transfer to be made, then and in such case the corporation, or person, or persons so permitting such transfer shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor, in the mean time, shall be valid or effectual as against the judgment creditor; and further that, unless the judgment debtor shall, within a time to be mentioned in such order, show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney, or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit.

Application for order..]—The application, therefore, for

an order to charge Government stock must be made in the first instance to a judge at chambers ;⁽¹⁾ and is made *ex parte* without notice to the other side. There should be an affidavit shortly stating the facts as follows :—

Form of Affidavit.

In the Q. B. ["C. P." or "Exch. of Pleas."]

Between A. B., plaintiff,
and

C. D., defendant.

I, A. B., of , the above-named plaintiff, make oath and say,

1. That C. D., the above-named defendant, is justly and truly indebted unto me in the sum of £ under, and by virtue of a judgment of this honourable court, entered up in this action on the day of 18 , whereby I recovered against the said defendant the said sum.

2. That there is now standing in the books of the Governor and Company of the Bank of England, in the names of T. A. and T. B., in trust for the said C. D. [or, in the defendant's name in his own right], the sum of £ , £3 per cent. reduced annuities, [or as the case may be], [or, there are shares now standing in the defendant's own name in a certain public company in England called "The company."]

3. And I further say, that I am informed and verily believe, that the said C. D. is beneficially interested in the said stock and entitled to the same, or to the dividends payable thereon for his own use and benefit.

Sworn, &c.

A. B.

The judge makes an order *nisi* in the first instance, which is a conditional order, charging the said stock in the meantime, unless cause be shown to the contrary on a day appointed. This order is drawn up and served on the opposite party, and upon the bank or company in which the stock stands. The time appointed for showing cause is generally a week,⁽²⁾ and the order must give a reasonable time to the other party to show cause. If it does not give sufficient time to show cause, the opposite party may within such time apply to the judge to vary the order and enlarge the time ;⁽³⁾ or he may appeal to the court against the order *nisi*, without waiting till it is made absolute.⁽⁴⁾ A

⁽¹⁾ *Brown v. Bamford*, 9 M. & W. 42.

⁽²⁾ *Robinson v. Burbridge*, 9 C. B. 289 ; 1 L. M. & P. 94.

⁽³⁾ 1 & 2 Vict. c. 110, s. 15.

⁽⁴⁾ *Robinson v. Burbridge*, 1 L. M. & P. 103 ; *Fowler v. Churchill*, 11 M. & W. 57 ; *Morris v. Manesty*, 7 Q. B. 675 ; but see *contra*, *Graham v. Connell*, 1 L. M. & P. 438 ; *Rogers v. Holloway*, 5 M. & Gr. 292.

judge of the Court of Chancery cannot make the order ; ⁽¹⁾ but he may make a stop-order auxiliary to the charging order.⁽²⁾ The opposite party cannot show cause until the time named in the order, if a particular day is fixed ;⁽³⁾ and if at that time he do not show cause, or the cause is insufficient, the judge makes the order absolute. The order can only charge the stock so far as the judgment debtor has a disposing power. The effect of the charging order is to give the judgment creditor the same right under the charging order as against prior incumbrancers, as he would have had under a valid and effectual charge made at the same moment by the debtor himself.⁽⁴⁾ The judgments have priority against the stock according to the date of registration.⁽⁵⁾

A pension granted by the East India Company, under a resolution of the directors, for services rendered is not chargeable.⁽⁶⁾ Shares in the Union Bank of London, which exists under a deed of settlement, providing against the transfer of shares without consent of the proprietors, and that in the event of their being charged they should be forfeited to the company, were allowed to be charged.⁽⁷⁾ Where the debtor's name stands on the register of a joint-stock company as the holder of shares, but he has executed a transfer by way of equitable mortgage to other parties, the stock may be well charged, for at law they are held by him in his own right.⁽⁸⁾ Stock standing in the name of the Accountant-General in Chancery to the separate account of the judgment debtor may be charged ;⁽⁹⁾ though all that is charged, being the interest of the debtor in the said stock, the right of prior incumbrancers is not affected thereby.⁽¹⁰⁾ So stock standing in the name of the Accountant-General, of which the debtor is only tenant for life, may be charged ; and the dividends may be thus intercepted.⁽¹¹⁾ Where by

⁽¹⁾ *Miles v. Pressland*, 4 M. & Gr. 431 ; 2 Beav. 300 ; *Hulkes v. Day*, 10 Sim. 41.

⁽²⁾ *Hulkes v. Day*, *supra* ; *Courtoy v. Vincent*, 19 L. T. 83 ; *Watts v. Jefferys*, 3 Macn. & G. 372.

⁽³⁾ Per Wilde, C. J. in *Robinson v. Burbridge*, 9 C. B. 289.

⁽⁴⁾ *Watts v. Porter*, 3 E. & B. 743 ; *Warburton v. Hill*, 1 Kay, 470.

⁽⁵⁾ *Dolland v. Johnson*, 23 L. J. 637, Ch.

⁽⁶⁾ *Morris v. Manesty*, 7 Q. B. 675.

⁽⁷⁾ *Graham v. Connell*, 1 L. M. & P. 438.

⁽⁸⁾ *Fuller v. Earle*, 7 Exch. 796.

⁽⁹⁾ *Robinson v. Burbridge*, 1 L. M. & P. 94.

⁽¹⁰⁾ *Hulkes v. Day*, 10 Sim. 41.

⁽¹¹⁾ *Watts v. Jefferys*, 3 Macn. & G. 372.

the terms of a will it was doubtful, whether the debtor took a beneficial interest in stock, the order was made charging the stock conditionally for so much of the dividends as were payable to the debtor himself for his own use and benefit.⁽¹⁾ Where the stock was vested in trustees for the defendant under a deed, which the plaintiff had filed a bill in equity to set aside as fraudulent, the court refused to interfere by setting aside an order charging such stock.⁽²⁾ Orders charging stock are not entered on the judgment roll, being no part of the record.⁽³⁾

7. *Interest on judgments.*]—By 1 & 2 Vict. c. 110, s. 17, every judgment debt shall carry interest at the rate of 4l. per cent. per annum from the time of entering up the judgment, or from the time of the commencement of this act (i. e., 1st Oct. 1838), in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. This enactment extends to judgments for the defendant.⁽⁴⁾ The entering up of the judgment means the time, when the Master taxes the costs and signs the allocatur, and also signs the judgment in his book; but where the taxation of costs was not completed till a motion to review the taxation had been disposed of, the court held that interest ran from the date of judgment being signed in the Master's book.⁽⁵⁾

As to amendment of judgment, see *post*, "Amendment."

(¹) *Fowler v. Churchhill*, 2 Dowl. N. S. 562.

(²) *Rogers v. Holloway*, 5 M. & Gr. 292.

(³) *Newton v. Boodle*, 18 L. J. 73, C. P.; 6 C. B. 532.

(⁴) *Pitcher v. Roberts*, 2 Dowl. N. S. 394.

(⁵) *Fisher v. Dudding*, 9 Dowl. 872; 3 M. & Gr. 238; *Newton v. Grand Junction Railway Company*, 16 M. & W. 139.

CHAPTER XXV.

AUDITA QUERELA.

A writ of *audita querela* is an equitable action, which lies for a person who either is in execution, or in danger of being so, upon a judgment or recognizance, when he has matter to show that such execution ought not to have issued, or should not issue against him.⁽¹⁾ The proceeding is seldom resorted to. Any matter (amounting to an equitable defence) which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querela*.⁽²⁾ But no writ of *audita querela* shall be allowed unless by rule of court or order of a judge.⁽³⁾ The writ is addressed in the name of the Crown to the court, and it sets out the record down to judgment and then proceeds to state the subsequent matter.⁽⁴⁾ The defendant then declares in the usual way, and the plaintiff then pleads, and he may plead several matters thereto.⁽⁵⁾ The court, however, grants a summary remedy on motion and affidavit in such cases, and the expense of an *audita querela* is seldom necessary.⁽⁶⁾ The writ is obtained on motion from the court, or on a summons at chambers on affidavit; ⁽⁷⁾ and it must be personally served.⁽⁸⁾

⁽¹⁾ 2 Wms. Saund. 147.

⁽²⁾ C. L. P. Act, 1854, s. 84.

⁽³⁾ Rule Pr. 79, H. T. 1853.

⁽⁴⁾ See a form, 2 Wms. Saund. 137 n.; *Lord Porchester v. Petrie*, 3 Doug. 261.

⁽⁵⁾ *Giles v. Hutt*, 1 Exch. 701.

⁽⁶⁾ *Sutton v. Bishop*, 4 Burr. 2287; *Humphreys v. Knight*, 6 Bing. 572; *Plevin v. Henshall*, 10 Bing. 24; *Barrow v. Poile*, 1 B. & Ad. 629; *Ouchterlony v. Gibson*, 6 Scott N. R., 577; *Turner v. Pulman*, 2 Exch. 508.

⁽⁷⁾ Rule Pr. 79, *supra*; see *Dearie v. Ker*, 4 Exch. 82; *Giles v. Hutt*, 1 Exch. 59.

⁽⁸⁾ *Williams v. Roberts*, 1 L. M. & P. 381.

CHAPTER XXVI.

PROCEEDINGS IN ERROR.

I. IN WHAT CASES ERROR LIES, BY AND AGAINST WHOM, AND IN WHAT COURT IT MAY BE BROUGHT.

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| 1. In what cases error lies. | 3. Within what time error must be brought. |
| 2. By and against whom error may be brought. | 4. In what court. |

II. PROCEEDINGS WHERE THE ERROR IS IN LAW.

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| 1. Memorandum of error in law, and Master's note of receipt thereof. Service of copy of note and grounds of error. | 2. Of the suggestion of error alleged and denied. |
| | 3. Setting down case for argument. Argument and judgment. |

III. PROCEEDINGS WHERE ERROR IS IN FACT, AND WHERE MATTER OF FACT IS RELIED ON AS A DEFENCE TO ERROR IN LAW.

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| 1. Of the memorandum and affidavit of error in fact. | fact relied on as a defence to error in law. |
| 2. Proceedings where matter of | 3. Of the assignment of error. |

IV. OF ERROR TO THE HOUSE OF LORDS FROM THE JUDGMENT OF THE EXCHEQUER CHAMBER.

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|-----------------------------|------------------------------------|
| 1. Suggestion of error, &c. | 4. Drawing up, &c. copies of case. |
| 2. Assignment of errors. | 5. Argument. |
| (a) Joinder in error. | 6. Judgment. |
| 3. Motion for hearing. | 7. Costs. |

V. OF THE PROCEEDINGS WHERE PARTY DIES.—OF CONFESSION AND DISCONTINUANCE.—OF QUASHING THE PROCEEDINGS—AND OF BAIL IN ERROR.

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|---|--|
| 1. Where party dies or female party is married pending the error. | 3. In what cases proceedings in error quashed. |
| 2. Of discontinuance and confession. | 4. Bail in error. |

1. *In what cases error lies.*—Error lies where a person is aggrieved by an error in the foundation, proceeding, judgment, or execution of a suit, provided the error be in substance, and be not aided at common law, or by some of the statutes of jeofails, and the judgment be final and not interlocutory, and be given in a court of record acting

according to the course of the common law.⁽¹⁾ In no case, however, can error be brought for any error in a judgment with respect to costs, but the error (if any) in that respect may be amended by the court in which such judgment may have been given, on the application of either party.⁽²⁾ Upon an award of a trial *de novo* by any one of the superior courts, or by the courts of error, upon matter appearing upon the record, error may at once be brought.⁽³⁾ Error does not lie on a judgment of nonsuit, unless it be for some error subsequent to the nonsuit.⁽⁴⁾ But where the court acts in a summary manner, or in a new course different from the common law, error will not lie,⁽⁵⁾ as in the case of an interpleader issue,⁽⁶⁾ or a feigned issue under the provisions of the Tithe Commutation Act, (6 & 7 Will. 4, c. 71, s. 46).⁽⁷⁾ Although interlocutory rules for the payment of money or costs have by force of the 1 & 2 Vict. c. 110, s. 18, "the effect of judgments," error will not lie upon them.⁽⁸⁾ The late acts, in prescribing new forms and remedies, have in some cases allowed error to be brought; thus, by the C. L. P. Act, 1854, s. 32, "error may be brought upon a judgment upon a special case in the same manner as upon a judgment upon a special verdict, unless the parties agree to the contrary;" and the proceedings for bringing a special case before the court of error are, as nearly as may be, the same as in the case of a special verdict. This provision does not apply where the case has been prepared before the passing of the act.⁽⁹⁾ And by the C. L. P. Act, 1852, s. 208, "error may be brought in like manner as in other actions upon any judgment in ejectment, after a special verdict found by a jury, or a bill of exceptions, or, by consent, after a special case stated."

2. *By and against whom error may be brought.*—Error may be brought by a party to the record, or by his heir, executors or administrators, or by one of several parties, or

(1) *Groenvelt v. Barwell*, 1 Salk. 263; *Samuel v. Judin*, 6 East, 333; Co. Litt. 289, c.

(2) Reg. Gen. H. T. 1853, r. 27. (3) C. L. P. Act, 1854, s. 43.

(4) *Corsar v. Reed*, 17 Q. B. 540; *Evans v. Swete*, 2 Bing. 326; In *Strother v. Hutchinson*, 4 Bing. N. C. 83, error was brought on a bill of exceptions on a nonsuit, and it was held to lie; but there the plaintiff appeared and refused to be nonsuited, and it was so alleged in the bill of exceptions.

(5) 2 Lord Raym. 213, 252, 454.

(6) *King v. Simmonds*, 7 Q. B. (N. S.) 289; *Snook v. Matlock*, 5 A. & E. 239. (7) *Thorpe v. Plowden*, 2 Exch. 387.

(8) *Newton v. Boodle*, 6 C. B. 532.

(9) *Hughes v. Lumley*, 2 E. & B. 358.

by a person injured by the judgment.⁽¹⁾ Thus, if lessee for life loses his lands by an erroneous judgment, the immediate remainder man or reversioner may bring error.⁽²⁾ And if tenant in tail lose his estate, and die without issue, error may be brought by the immediate remainder man or reversioner.⁽³⁾ But where there is one judgment against the principal, and another against the bail, the one cannot maintain error on the judgment against the other,⁽⁴⁾ nor can they join in error.⁽⁵⁾ A plaintiff may bring error to reverse his own judgment, if he is dissatisfied with it.⁽⁶⁾ Error can only be brought against a party or privy to the judgment, or his heirs, executors or administrators.⁽⁷⁾

3. *Within what time error must be brought.*—By the C. L. P. Act, 1852, s. 146, “no judgment in any cause shall be reversed or avoided for any error or defect therein, unless error be commenced, or brought and prosecuted with effect, within six years after such judgment signed or entered of record;” but if the person entitled to bring error “is or shall be at the time of such title accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person shall be at liberty to bring error as aforesaid, so as such person commences, or brings and prosecutes the same with effect, within six years after coming to or being of full age, *discover*, of sound memory, or return from beyond the seas; and if the opposite party shall at the time of the judgment signed or entered of record, be beyond the seas, then error may be brought, provided the proceedings be commenced and prosecuted with effect within six years after the return of such party from beyond seas.”⁽⁸⁾ Error, however, may be brought even before the judgment is signed.⁽⁹⁾

4. *In what court error must be brought.*—If the error be in fact it lies in the same court; ⁽¹⁰⁾ if in the judgment itself, and not in the process, it must be brought in another and superior court.⁽¹¹⁾ From a judgment of the Queen’s Bench,

⁽¹⁾ Roll. Abr. 747; 1 Leon. 261; *Rundell’s case*, 2 Mod. 308

⁽²⁾ 9 R. 2 C. 3; *Anon.* 5 Mod. 397.

⁽³⁾ 3 Co. 3 B.; *Sheepshanks v. Lucas*, 1 Bur. 410; *Lloyd v. Vaughan*, 2 Str. 1257. ⁽⁴⁾ *Bushel v. Yaller*, Cro. Car. 408.

⁽⁵⁾ *Lancaster v. Kayleigh*, Cro. Car. 300.

⁽⁶⁾ *Johnson v. Jebb*, 3 Burr. 1772.

⁽⁷⁾ Bro. Abr. “Error” 9.

⁽⁸⁾ *Ibid.* s. 147.

⁽⁹⁾ *Baker v. Bulstrode*, 1 Vent. 255; *Emanuel v. Martin*, 2 M. & S. 332.

⁽¹⁰⁾ *Castledine v. Mundy*, 4 B. & Ad. 97.

⁽¹¹⁾ Roll. Abr. 749.

Common Pleas, or Exchequer, error lies to the Exchequer Chamber, constituted of the judges of the two superior courts other than that in which the original judgment was given, and from thence to the House of Lords.⁽¹⁾ But it appears that error will not lie on a judgment in a criminal information in the Exchequer for penalties for an offence against the revenue laws.⁽²⁾ But it lies from the decision of the court on a petition of right.⁽³⁾

Palatine courts.]—By the C. L. P. Act, 1852, s. 233, it is provided that the Court of Queen's Bench shall still be the court of error, from the Court of Common Pleas at Lancaster, and Court of Pleas at Durham; and it is allowed to either party to allege errors in the judgment in the Court of Queen's Bench, and proceed thereon as in the case of errors alleged in actions depending in that court.

Other inferior courts of record.]—With a few exceptions error lies from all inferior courts of record primarily to the Court of Queen's Bench.⁽⁴⁾ It is provided by the C. L. P. Act, 1852, s. 228, that an order in council may from time to time direct all or any of its provisions, or of the rules made in pursuance thereof, shall apply to all or any court or courts of record in England or Wales. It may be sufficient to mention here once for all that the practice in such inferior courts, to which the act has not been extended, would appear to be regulated by the 19 Geo. 3, c. 70, s. 5, and 7 & 8 Geo. 4, c. 71, s. 6, which provide that no execution shall be stayed or delayed upon or by proceedings in error, or supersedeas thereon for the reversing of any judgment given or to be given in any inferior court of record where the damages are under 20*l.*, unless security be given by two sufficient sureties in double the amount of the judgment to prosecute the proceedings in error with effect, &c. After the transmission of the record the proceedings are the same as in the case of error on a judgment in one of the superior courts. Execution is issued out of the Court of Queen's Bench as if the action had been originally commenced there.⁽⁵⁾ From the judgment of the Queen's Bench error lies to the Exchequer Chamber, and ultimately to the House of Lords.⁽⁶⁾

⁽¹⁾ 11 Geo. 4 & 1 Will. 4, c. 70, s. 8.

⁽²⁾ See per Pollock, C. B., in *Attorney-General v. Otto Radloff*, 23 L. J. 247, Exch. ⁽³⁾ *Baron de Bode v. The Queen*, 13 Q. B. 36.

⁽⁴⁾ 1 Roll. Abr. 745. ⁽⁵⁾ *Spencer v. Haggiadur*, 5 D. & L. 66.

⁽⁶⁾ *Nesbit v. Rishton*, 9 A. & E. 426.

1. Memorandum of error in law, and Master's note of receipt thereof. Service of copy of note and grounds of error.
2. Of the suggestion of error alleged and denied.
3. Setting down case for argument. Argument and judgment.

1. *Memorandum of Error in Law, and Master's Note of receipt thereof. Service of Copy of Note, and Grounds of Error.*

Writ of error abolished.]—Error may be in law or fact. As the proceedings in the one differ from those in the other they will receive here a separate consideration, premising, that as to both the writ of error is abolished by the C. L. P. Act, 1852, s. 148, as to all future proceedings, and the proceeding to error is now a step in the cause, and must be taken in the manner mentioned in that act. The writ of error is not abolished for all purposes. It must still be brought where the alleged error is in a judgment on an information in the nature of a *quo warranto*, and in all criminal proceedings.⁽¹⁾ Also where it is on the judgment of an inferior court of record other than the Court of Common Pleas at Lancaster and the Court of Pleas at Durham.

Memorandum.]—As to the mode of proceeding where the error is in law, it is provided by the C. L. P. Act, 1852, s. 149, that either party alleging error in law may deliver to one of the Masters of the court a memorandum in writing in the form contained in the schedule A., No. 10, to that act annexed, or to the like effect, entitled in the court and cause, and signed by the party or his attorney alleging that there is error in law in the record and proceedings, whereupon the Master shall file such memorandum, and deliver to the party lodging the same a note of the receipt thereof. This is the

Court of Queen's Bench.

A. B. and C. D. The day of 18 . [The
day of lodging note of error.]

The plaintiff [or defendant] says that there is error in the above record and proceedings, and the defendant [or plaintiff] says that there is no error therein.

[Signed,] A. B., plaintiff,
 [or C. D., defendant,]
 [or E. F., attorney for plaintiff or defendant.]

(¹) *Rez v. Seal*, 24 L. J. 221, Q. B.

In case the judgment upon which error is brought was against several persons, and one or some only proceed in error, the above memorandum alleging error, and the note of the receipt of such memorandum must state the names of the persons by whom the proceedings are taken.⁽¹⁾

Service of note and grounds of error.]—After the above memorandum alleging error is filed, the plaintiff in error must serve upon the opposite party, or his attorney, a copy of the Master's note of the receipt of the same, together with a statement of the grounds of error.⁽²⁾

Supersedeas of execution.]—Proceedings in error in law are deemed a supersedeas of execution from the time of the service of a copy of such note, together with the statement of the grounds of error intended to be argued, until default in putting in bail, or an affirmance of the judgment, or discontinuance of the proceedings in error, or until the proceedings in error are otherwise disposed of without a reversal of the judgment ; but if the grounds of error appear to be frivolous, the court or a judge upon summons may order execution to issue.⁽³⁾ This power was exercised under the old practice, where the grounds of error specified in the notice of allowance was frivolous, and probably the practice now will be in strict analogy to that. Service of a copy of the note of the receipt of the memorandum will not operate as a supersedeas of execution unless there be also a statement of the grounds of error served ; but if there is any statement, however frivolous or insufficient, it cannot be treated as a nullity, and execution issued. But before doing so application must be made to the court or a judge for a rule *nisi* or a summons to show cause why execution should not issue.⁽⁴⁾ A statement of the grounds of error in an action of slander that the declaration was bad, the words not being actionable without special damage, and that the inuendoes were bad in law, was considered a sufficient statement of the grounds of error.⁽⁵⁾ Where the point stated had been argued and decided on a rule granted to arrest the judgment, the Court of Exchequer refused to

(1) C. L. P. Act, 1852, s. 154.

(2) *Ibid.* s. 149.

(3) *Ibid.* s. 150.

(4) Bagley's Pract. 344 ; 1 Burr. 340.

(5) *Robinson v. Day*, 2 Dowl. 591.

allow execution to issue as upon a frivolous ground of error; ⁽¹⁾ so where the question involved a point of practice, and individual judges had acted differently with respect to it. ⁽²⁾ Formerly, if it were made to appear that error was brought for delay, the court allowed execution to issue. ⁽³⁾ But since the above enactment this would appear no longer a ground. If execution be issued, after the proceedings have operated as a supersedeas, without leave of the court or a judge, the court will set it aside. ⁽⁴⁾

2. *Of the Suggestion of Error alleged and denied:—*

(a) *Suggestion of error.*—The assignment of and joinder in error in law are now abolished, and the mode of proceeding is by the entry on the judgment roll of a suggestion to the effect that error is alleged by the one party and denied by the other, ⁽⁵⁾ which suggestion must be entered and the roll made up by the plaintiff in error within ten days after the service of the note of the receipt of the memorandum alleging error, or within such other time as the court or a judge may order, and in default thereof the defendant in error, his executors or administrators, are at liberty to sign judgment of *non pros*. ⁽⁶⁾ The *non pros* is entered upon the roll in the court below, and no entry of a remittitur is necessary. ⁽⁷⁾ It would seem that the suggestion can neither be traversed nor demurred to. The form of suggestion is given by the C. L. P. Act, 1852, schedule A., No. 11, and is as follows:—

The day of A. D. 18 . [*The day of making the entry on the roll.*]

The plaintiff [*or defendant*] says that there is error in the above record and proceeding, and the defendant [*or plaintiff*] says that there is no error therein.

(b) *By one of several parties.*—Where error has been brought by one of several plaintiffs or defendants in case the other persons against whom judgment has been given, decline

⁽¹⁾ *Gardner v. Williams*, 3 Dowl. 796.

⁽²⁾ *Newton v. Lord Albert Conyngham*, 5 D. & L. 762; S. C., 6 C. B. 749.

⁽³⁾ *Miller v. Cousins*, 2 B. & P. 329; *Bygrove v. Bolland*, 2 Chit. 193.

⁽⁴⁾ *Somerville v. White*, 5 East, 145.

⁽⁵⁾ C. L. P. Act, 1852, s. 152.

⁽⁶⁾ *Ibid.* s. 153.

⁽⁷⁾ *Reg. v. King*, 14 L. J. 68, Q. B.

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to join in the proceedings in error, the same may be continued, and the suggestion that error is alleged by the one party and denied by the other entered, stating the persons by whom the proceedings are brought, without any summons and severance, or if such other persons elect to join, then the suggestions shall state them to be, and they shall be deemed as, plaintiffs in error, although not mentioned as such in the previous proceedings.⁽¹⁾

(c) *Where matter of fact relied upon.*]—Where the defendant in error intends to rely upon the proceedings in error being barred by lapse of time or by release of error, or other like matter of fact, he must give four days' written notice to the plaintiff in error to assign error, as before the change of practice, instead of entering the suggestion.⁽²⁾ As to the assignment of error, pleas and subsequent proceedings in such case, see *post*, 541.

3. *Setting down Case for Argument, Argument and Judgment.*—

(a) *Setting down case for argument.*]—After the suggestion of error in law alleged and denied is entered, either party may set down the case for argument, and forthwith give notice in writing to the opposite party, and proceed to the argument thereof, as on a demurrer without any rule or motion for a *concilium*.⁽³⁾ The case must be entered for argument with one of the Masters of the court in which the original judgment was given. It may be entered four clear days before the first day appointed for hearing arguments in the Exchequer Chamber, whether in term or vacation.⁽⁴⁾ Regularly the plaintiff in error should set down the case for argument, but if he do not the defendant may. Care should be taken that it be set down in time for the copies of the roll to be delivered to the judges.

(b) *Delivery of copies of judgment roll to judges.*]—Copies of the judgment roll must be delivered to the judges before the day appointed for the argument, in accordance with Reg. Gen. H. T. 16 Vict. (Pr.) r. 68, which is as follows :—

⁽¹⁾ C. L. P. Act, 1852, s. 154.

⁽²⁾ *Ibid.* s. 152.

⁽³⁾ Reg. Gen. H. T. 1853, (Pr.) r. 67.

⁽⁴⁾ *South Eastern Railway Company v. South Western Railway Company*, 8 Exch. 367.

"Four clear days before the day appointed for argument, the plaintiff in error shall deliver copies of the judgment roll of the court below to the judges of the Queen's Bench on error from the Common Pleas or Exchequer, and to the judges of the Common Pleas on error from the Queen's Bench; and the defendant in error shall deliver copies thereof to the other judges of the Exchequer Chamber before whom the case is to be heard; and in default by either party the other party may on the following day deliver such books as ought to have been delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies." Where the day for hearing errors was appointed on the 24th of May for the 28th inst., it was held that the plaintiff in error could not object that he had delivered books for the defendant, who had not paid for them, there not having been four clear days before the day appointed for argument.⁽¹⁾

*Judgment roll, how brought into Court of Error.]—*After the cause is set down for argument, the judgment roll is, without any writ or return, brought by the Master into the Court of Error in the Exchequer Chamber, before the justices, or justices and barons as the case may be, of the two superior courts of common law, on the day of its sitting, at such time as the judges shall have appointed, either in term or in vacation, or if the proceedings in error be before the High Court of Parliament, then before the High Court of Parliament before or at the time of its sitting.⁽²⁾ The judgment roll itself is left in the court of error, and remains there until the judgment is either reversed or affirmed; it is then returned to the court in which the original judgment was given.⁽³⁾

*(c) Palatine Courts.]—*Where the error is from the Court of Common Pleas at Lancaster or Court of Pleas at Durham, a transcript of the record of the judgment or proceedings in those courts on which error is alleged is transmitted to the Court of Queen's Bench.⁽⁴⁾

⁽¹⁾ *Kernot v. Pittis*, 17 Jur. 932.

⁽²⁾ C. L. P. Act, 1852, s. 155.

⁽³⁾ *Lane v. Hooper*, 3 E. & B. 731; 23 L. J. 272, Q. B.

⁽⁴⁾ C. L. P. Act, 1852, s. 233.

(d) *Argument.*]—On the argument the counsel for the plaintiff in error is first heard, then the counsel for the defendant, and the plaintiff's counsel replies. Only one counsel is heard for each party.⁽¹⁾ The judges deliver their opinions *seriatim*, and the judgment below is affirmed or reversed in accordance with the opinion of the majority; but if the court be equally divided the judgment is affirmed.⁽²⁾ If there be no argument counsel must move for judgment of affirmance or reversal. Counsel may take advantage of any error appearing on the face of the record.⁽³⁾

(e) *Judgment.*]—The court of error reviews the proceedings, and gives such judgment as they are advised thereon.⁽⁴⁾ They may award a repleader or direct a trial *de novo*.⁽⁵⁾ And courts of error have now power in all cases to give such judgment, and award such process, as the court from which error is brought ought to have done without regard to the party alleging error.⁽⁶⁾ Under this section a court of error may perhaps now, although it could not formerly, direct a writ of inquiry.⁽⁷⁾ This latter provision has exploded a distinction which existed under the old practice between cases where the error was brought by the defendant below, and cases where it was brought by the plaintiff below; in the former case, if the judgment was in favour of the plaintiff in error, the judgment was simply *quod judicium reversatur*, in the latter, the court gave such judgment as the court below ought to have given.⁽⁸⁾ But in either case the court now gives the judgment which ought to have been given below. Further, there was a class of cases founded upon the doctrine that a judgment being an entire thing could not be affirmed in part or reversed in part, and therefore if one part was bad and

(1) *Doe v. Burdett*, 9 A. & E. 939, n. (a).

(2) *Thornley v. Fleetwood*, 1 Str. 381.

(3) *Weedon v. Woodbridge*, 13 Jur. 627; *Farr v. Dann*, 1 Bur. 363.

(4) C. L. P. Act, 1852, s. 155.

(5) Reg. Gen. H. T. 1853, (Pr.) r. 24. A court of error could before the rule award a *venire de novo*, *Campbell v. The Queen*, 11 Q. B. 799; but not a repleader, *Gwynne v. Burnell*, 1 Sc. N. R. 711.

(6) C. L. P. Act, 1852, s. 157.

(7) *Phillips v. Jones*, 15 Q. B. 859.

(8) *Grey v. Friar*, 15 Q. B. 912; *Phillips v. Jones*, *ibid.* 859; *Gregory v. The Duke of Brunswick*, 3 C. B. 481.

another good, unless the parts were distinct and independent, the court of error could only reverse the judgment; ⁽¹⁾ but the authority of those cases, together with the rule upon which they were founded is now abolished by the same enactment, and the court of error may reverse a judgment in part and affirm it as to other part.⁽²⁾ Where error is brought on a special case the court of error either affirms the judgment or gives the same judgment which ought to have been given in the court in which it was originally decided, the court of error being required to draw any inferences of fact from the facts stated in such special case which the court where it was originally decided ought to have done.⁽³⁾ The common judgment for the plaintiff in error is, that the judgment be reversed; for the defendant in error that it be affirmed.

(f) *Quashing proceedings.*—In addition to the above-mentioned powers of affirming, reversing, or varying the judgment below, courts of error may quash the proceedings in error.⁽⁴⁾

(g) *Entry of judgment.*—The proceedings and judgment, as altered or affirmed, must be entered on the original record, and such further proceedings as may be necessary thereon are awarded by the court in which the original judgment was given.⁽⁵⁾

(h) *Interest.*—By the 3 & 4 Will. 4, c. 42, s. 30, interest is given to the defendant in error, where the judgment is in his favour, for such time as the execution has been delayed, where the writ of error is “upon any judgment whatsoever given in any court in any action personal;” and by the Reg. Gen. H. T. 1853 (Pr.) r. 26, “on error from one of the superior courts such court shall have power to allow interest for such time as execution has been delayed by the proceedings in error for the delaying thereof, and the Master on taxing the costs may compute such interest without any rule of court, or order of a judge for that purpose.”

⁽¹⁾ *Parker v. Harris*, Carth. 234; *Cutting v. Williams*, 1 Salk. 24; *Nesbitt v. Rishton*, 11 A. & E. 244.

⁽²⁾ *Kernot v. Pittis*, 23 L. J. 33, Q. B.

⁽³⁾ C. L. P. Act, 1854, s. 32.

⁽⁴⁾ See *post*.

⁽⁵⁾ C. L. P. Act, 1852, s. 155; *Lane v. Hooper*, 23 L. J. 372, Q. B.

(i) *Mesne profits, damages, and costs in ejectment.*—Where error is brought upon a judgment in ejectment, and the judgment is affirmed, or proceedings in error discontinued, the court may, upon the application of the claimant, issue a writ to inquire as well of the mesne profits as of the damage by any waste committed after the first judgment in ejectment; which writ may be tested on the day on which it shall issue, and be returnable immediately after the execution thereof; and upon the return thereof judgment shall be given, and execution awarded, for such mesne profits and damages, and also for costs of suit.⁽¹⁾

(k) *Form of judgment.*—The following forms of judgment of affirmance, and judgment of reversal in the Exchequer Chamber on a special case, are prescribed by Reg. Gen. M. V. 1854, sched. 19 and 20 respectively, and may without difficulty be adapted to other cases.

Judgment of Affirmance by Court of Error in the Exchequer Chamber, on a Special Case.

[*Copy to the end of the judgment on the roll in the action, and then proceed thus*]:—Afterwards on [*the day of lodging the note of error*] the defendant [*or “plaintiff”*] delivered to one of the Masters of the court here a memorandum in writing in the form required by and according to the statute in that case made and provided, alleging that there was error in law in the record and proceedings aforesaid; and afterwards on [*the day of making the entry of the suggestion on the roll*] the defendant [*or “plaintiff”*] said that there was no error therein: And thereupon afterwards on [*the day of giving judgment in the Exchequer Chamber*] in the Court of Exchequer Chamber of our Lady the Queen, before the justices of the Common Bench of our said Lady the Queen and the barons of her Exchequer [*or if the error be on a judgment of the Common Pleas, say, “before the justices of our Lady the Queen assigned to hold pleas in the court of our said Lady the Queen, before the Queen herself and the barons of her Exchequer, “or, if the error be on a judgment of the Exchequer, say, “before the justices of our Lady the Queen assigned to hold pleas in the court of our Lady the Queen, before the Queen herself and the justices of the Common Bench of our said Lady the Queen,”*] come as well the plaintiff as the defendant, by their respective attorneys aforesaid;* and it appears to the said Court of Error in the Exchequer Chamber, that there is no error in the record and proceedings aforesaid, or in giving the judgment aforesaid. Therefore it is considered by the said Court of Error that the judgment aforesaid be in all things affirmed,

(1) C. L. P. Act, 1852, s. 208.

and stand in full force and effect, the said causes above for error suggested in anywise notwithstanding. And it is further considered by the said court that the said plaintiff do recover against the defendant £ , for his damages and costs which he had sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretence of the prosecution of the said proceedings in error, and that the plaintiff have execution thereof.

Judgment of Reversal in the like Case.

[*The same as the preceding form to the asterisk * and then thus:*]—And it appears to the said Court of Error that there is manifest error in the record and proceedings aforesaid, and in giving the judgment aforesaid. Therefore it is considered by the said Court of Error, that the judgment aforesaid for the errors aforesaid be reversed, annulled, and altogether holden for nought; and that the said defendant be restored to all things which he hath lost by occasion of the said judgment, &c.

(*l*) *Palatine Courts.*]—Error lies, as we have seen, from the Court of Common Pleas at Lancaster, and Pleas at Durham, to the Court of Queen's Bench. And the proceedings are brought into the Court of Error by transmission of a transcript of the record; the judgment of the Court of Queen's Bench thereon is certified by one of the Masters of the Court of Queen's Bench on the transcript, or by rule of court as the said court may direct, and thereupon such judgment must be entered on the original record in the said respective courts of Common Pleas at Lancaster, and Pleas at Durham, and such further proceedings as may be necessary thereon shall be awarded by the said respective courts.⁽¹⁾

(*m*) *Costs and taxation.*]—Four days exclusive after the judgment delivered the costs may be taxed, interest, when recoverable, computed, and judgment signed by one of the Masters of the court in which the original judgment was given, as in ordinary cases.⁽²⁾ The cost of proceedings in error are taxed and allowed as costs in the cause. No double costs in error are allowed to either party.⁽³⁾ It is lawful for the Court of Error, in any case in which the judgment is affirmed in error, to adjudge costs to the defendant in error.⁽⁴⁾ As to costs where error is brought to reverse a judgment

(1) C. L. P. Act, 1852, s. 233.

(2) See 7 Will. 4 & 1 Vict. c. 30, ss. 22, 23.

(3) Reg. Gen. H. T. 1853, (Pr.) r. 25.

(4) C. L. P. Act, 1854, s. 43.

for the plaintiff, if the defendant bring it before execution had,⁽¹⁾ and the judgment be in favour of the defendant in error, he shall, at the discretion of the court, recover his costs and damages for the delay,⁽²⁾ and this although no costs were recoverable in the original suit.⁽³⁾ But if before bringing error he pay the debt and costs to the plaintiff in the original action, the latter is not entitled to his costs in error under this statute.⁽⁴⁾ An avowant in replevin is not a plaintiff within the act.⁽⁵⁾ By 13 Car. 2, stat. 2, c. 2, s. 10, if a judgment given after verdict be affirmed in error, the defendant in error shall have double costs [for which a full and reasonable indemnity is substituted by 5 & 6 Vict. c. 97, s. 2.] This enactment applies only where error is brought by the defendant below.⁽⁶⁾ And it was held not to apply where the damages and costs had been previously paid to the opposite attorney.⁽⁷⁾ Costs of settling a bill of exceptions are costs in error, and within the meaning of costs in the act.⁽⁸⁾ The 8 & 9 Will. 3, c. 11, s. 2, entitles a defendant in error, who was the defendant below, to his costs upon affirmance of the judgment, discontinuance, or nonsuit. If the judgment below be reversed, each party pays his own costs in error, but the prevailing party has his costs in the original action.⁽⁹⁾ This was the rule before the change of practice, and it still prevails.⁽¹⁰⁾

(n) *Restitution.*—If the judgment below be reversed, the plaintiff in error may have a writ of restitution, that he may be restored to all that he has lost by the judgment,⁽¹¹⁾ or he may obtain redress by application for that purpose to the court or a judge.

(¹) *Newlands v. Holmes*, 4 Q. B. 858; *R. v. Inhabitants of Madley*, 2 Str. 1190.

(²) 3 Hen. 7, c. 10; 19 Hen. 7, c. 20.

(³) *Ferguson v. Rawlinson*, 2 Str. 1084.

(⁴) *Sutherland v. Mills*, 5 Exch. 980.

(⁵) *Goding v. Dias*, 1 East, 2.

(⁶) *Baring v. Christie*, 5 East, 545.

(⁷) *Wright v. Fairfield*, 2 B. & Ad. 959.

(⁸) *Francis v. Harvey*, 5 M. & W. 272.

(⁹) *Gilhard v. Gladstone*, 12 East, 668; *Adams v. Meredew*, 3 Y. & J. 419.

(¹⁰) *Fisher v. Bridges*, 24 L. J. 165, Q. B.; *Marshall v. Jackson*, *ibid.* 166 n. (3)

(¹¹) *Simpson v. Jackson*, Cro. Jac. 290; 2 Bac. Abr. "Error" (M.) 3; 2 Saund. 101 y. 69.

III. PROCEEDINGS WHERE THE ERROR IS IN FACT, AND WHERE MATTER OF FACT IS RELIED ON AS A DEFENCE TO ERROR IN LAW.

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| 1. Of the memorandum and affidavit of error in fact. | fact relied on as a defence to error in law. |
| 2. Proceedings where matter of | 3. Of the assignment of error. |

1. *Of the memorandum and affidavit of error in fact.*—As the proceedings where error in fact is alleged, and where matter of fact is set up as a defence to the allegation of error in law, are nearly the same, both involving issues of fact, and in both an assignment of errors being necessary, they will be considered together. And first of error in fact.

(a) *Error in fact what.*—Matters of fact which may be assigned for error are such as, if they had appeared upon the record, would have proved it to be erroneous. Thus it is ground of error that the defendant, or one of several defendants, being under age, appeared by attorney,⁽¹⁾ or by *prochein amy*,⁽²⁾ and not by guardian; (but a defendant in ejectment cannot assign this for error;) ⁽³⁾ or that the plaintiff or defendant, or one of several defendants, was a married woman at the commencement of the suit.⁽⁴⁾ It is also a ground of error that the plaintiff or defendant died before verdict or interlocutory judgment,⁽⁵⁾ where his personal representatives have not been made parties:⁽⁶⁾ but by the C. L. P. Act, 1852, s. 139, "the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict." And it must be borne in mind that only one error in fact can be assigned.⁽⁷⁾

(b) *In what court it lies.*—Error in fact cannot be brought in the Exchequer Chamber or House of Lords, but it lies in the same court in which the process is.⁽⁸⁾

(1) *Castledine v. Mundy*, 4 B. & Ad. 90; *Bevan v. Cheshire*, 4 Dowl. 70; *Bird v. Pegg*, 5 B. & Ald. 418; *Foxwist v. Tremaine*, 2 Wms. Saund. 212 a, n. (4)

(2) *Simpson v. Jackson*, Cro. Jac. 640.

(3) *Goodright v. Wright*, 1 Str. 33.

(4) Roll. Abr. 761; *Coan v. Bowles*, 1 Show. 165.

(5) 2 Saund. 101 k.

(6) See C. L. P. Act, 1852, ss. 135 to 140.

(7) F. N. B. 45 (c.)

(8) *Roe v. More*, 2 Com. R. 597; *Castledine v. Mundy*, 4 B. & Ad. 97.

(c) *How alleged.*—The party alleging error in fact must deliver to the Master a memorandum in compliance with the C. L. P. Act, 1852, s. 158, which provides, that either party alleging error in fact may deliver to one of the Masters of the court a memorandum in writing, in the form contained in Schedule (A) No. 12, or to the like effect, entitled in the court and cause, and signed by the party or his attorney, alleging that there is error in fact in the proceedings, together with an affidavit of the matter of fact in which the alleged error consists, whereupon the Master shall file such memorandum and affidavit, and deliver to the party lodging the same a note of the receipt thereof. As to the affidavit under the old practice, see *Birch v. Triste*, 8 East, 415; *Ribout v. Wheeler*, Say. 166. The memorandum must be as follows, or to the like effect:—

In the Q. B. ["C. P." or "Exch. of Pleas."]

The day of in the year of our
Lord, 18 , [the day of lodging the note of error.]

Between A. B. and C. D. in error.

The plaintiff [or defendant] says, that there is error in fact in the record and proceedings in this action, in the particulars specified in the affidavit hereunto annexed.

(Signed)

A. B. plaintiff,

[or C. D. defendant.

[or E. F., attorney for plaintiff or defendant.]

(d) *Form of Affidavit.*—The affidavit accompanying the affidavits may be as follows:—

In the Q. B. ["C. P." or "Exch. of Pleas."]

Between A. B., plaintiff,
and

C. D. defendant.

I, X. Y. of , make oath and say, that I well know C. D., the defendant in this cause, and that I verily believe that the said C. D., at the time of the commencement of this suit was, and is now on this day of A.D. an infant below the age of twenty-one years, and that the said C. D. did notwithstanding appear to this action by attorney, that is to say, by one W. W., and not by guardian [or &c., according to the ground of error.]

Sworn, &c.

X. Y.

(e) *Service of Master's note, and copy affidavit.*—The party alleging error in fact should forthwith serve upon the opposite party or his attorney a copy of the Master's note of

the receipt of the memorandum of error in fact and of the affidavit.⁽¹⁾ It is enacted that "such service shall have the same effect, and the same proceedings may be had thereafter as heretofore had after the service of the rule for allowance of a writ of error in fact."⁽²⁾ It would appear that after the opposite party has thus notice of error being brought, he cannot sue out execution on the judgment without leave of the court or a judge, though the proceedings do not operate as a supersedeas of execution, such having been the effect of service of the rule for allowance of the writ under the old practice.⁽³⁾ No bail in error is necessary.⁽⁴⁾

Within what time error must be assigned.—Within eight days after the filing with the Master of the memorandum of error in fact, the plaintiff in error must assign error; and in default the defendant in error, his executors, or administrators, are entitled to sign judgment of *non pros.*⁽⁵⁾

2. Proceedings where Matter of Fact relied on as a Defence to Error in Law :—

(a) Facts affording a defence.—Error in law may be truly alleged, and yet the opposite party, without denying the error, may have a right to set up a matter of fact as a bar. Thus there may have been a release of errors,⁽⁶⁾ or of all suits between the parties,⁽⁷⁾ or of all suits of a like nature with that in which error is brought,⁽⁸⁾ and such release affords a good answer to the proceedings in error; but where there are several plaintiffs in error a release by one is no bar against the others.⁽⁹⁾ So the Statute of Limitations affords a good answer.⁽¹⁰⁾ And it is a bar that the plaintiff in error has granted to another his right in the thing in dispute.⁽¹¹⁾

(1) C. L. P. Act, 1852, s. 158.

(2) *Ibid.*

(3) *Semple v. Turner*, 6 M. & W. 152; *Knight v. Thynne*, 9 Dowl. 284; *Levy v. Price*, 2 M. & W. 533; *Alstrop v. Sexton*, 1 Dowl. N. S. 33.

(4) *Alstrop v. Sexton*, *supra*.

(5) Reg. Gen. H. T. 1853. (Pr.) r. 64.

(6) Roll. Abr. 788; *Davenant v. Raftor*, 2 Lord Raym. 1046.

(7) *Cole's case*, Latch. 110.

(8) Co. Lit. 228 b.

(9) *Razing v. Ruddock*, 6 Co. 25 a.; *Hacket v. Herne*, 3 Mod. 135.

(10) *Winn v. Lloyd*, 1 Ler. 22; *Street v. Hopkinson*, 2 Str. 1055.

(11) 9 Hen. 6, c. 48; Roll. Abr. 788, 789.

(b) *Notice requiring assignment of error.*]—We have seen that there is now no assignment of or joinder in error where the only issue is as to whether there be error or not in the record; where, however, the defendant in error intends to rely upon the proceedings in error being barred by lapse of time, or by release of error, or other like matter of fact, it cannot be dispensed with; and in such case he must give four days written notice to the plaintiff in error, to assign error as before the change of practice instead of entering the suggestion.⁽¹⁾ This notice should be given within at least ten days after service of the Master's note of the receipt of the memorandum alleging error.

(c) *Within what time error to be assigned.*]—The plaintiff in error must within the four days after service of the notice, assign error, or in default thereof the defendant in error, his executors, or administrators, are at liberty to sign judgment of *non pros.*⁽²⁾

3. *Of the assignment of error.*]—The plaintiff in error must, as we have seen, assign error, within eight days after filing with the Master the memorandum of error in fact, or within four days after receipt of notice from the defendant in error that he intends to rely on matter of fact as a defence to the proceedings in error in law.

(a) *Of the assignment of error in law.*]—Where the memorandum has been of error in law, and notice has been given of a defence of matter of fact, the assignment must of course be of the error in law, and the proceedings are in the Exchequer Chamber. If the errors appear on the face of the record they may be assigned generally, *i.e.*, that the declaration is insufficient in law to maintain the action, and that the judgment in the original action was given for the wrong party.⁽³⁾ Where the error is an outbranch of the record, as where no appearance has been entered, it must be assigned specially, termed "alleging diminution," and verified upon *certiorari*, which is a judicial writ issued out of the Exchequer Chamber, tested in the name of the chief judge of the court below.⁽⁴⁾

(1) C. L. P. Act, 1852, s. 152.

(2) *Ibid.* s. 153; *St. Katherine Dock Company v. Higgs*, 10 Q. B. 652.

(3) *Farr v. Lenn*, 1 Bur. 363; 2 Saund. 110 q.; Roll. Abr. 761.

(4) *Griddell v. Tyson*, 2 Lord Raym. 1441; *Bowers v. Mann*, 1 Strange, 765.

Nothing can be assigned which contradicts the record,⁽¹⁾ or which might have been pleaded by the plaintiff in error in abatement,⁽²⁾ or in bar of the action.⁽³⁾ Several errors in law may be assigned ; but no error in fact can be assigned with them.⁽⁴⁾ The assignment must be properly entitled in the cause.⁽⁵⁾ If plaintiff in error be an infant he should plead it by guardian.⁽⁶⁾

(b) Form of assignment.]—The following is the form of an assignment of common errors in law :

In the Exchequer Chamber.

The day of A.D. .

C. D. } Afterwards, that is to say on the day of
v. } [day of lodging note of error] A.D. 18 , before
A. B. } the justices of our Lady the Queen of the Bench, and
the Barons of the Exchequer of our said Lady the Queen of the degree
of the coif, [*if from the C. P.*, "before the justices of our Lady
the Queen assigned to hold pleas in the court of our Lady the Queen
before the Queen herself, and the Barons of the Exchequer of our
said Lady the Queen of the degree of the coif" *if from the
Exchequer*, "before the justices of our Lady the Queen assigned to
hold pleas in the court of our Lady the Queen before the Queen herself,
and the justices of our Lady the Queen of the Bench,] in the Exchequer
Chamber, comes the said C. D. by D. A. his attorney and says that in
the record and proceedings aforesaid, and in giving the judgment
aforesaid there is manifest error, in this that the declaration aforesaid
and the matters therein contained are not sufficient in law for the said
A. B. to have or maintain his aforesaid action thereof against him, the
said C. D., whereas by the law of the land the said judgment ought to
have been given for the said C. D. against the said A. B., and the
said C. D. prays that the judgment aforesaid for the errors aforesaid
and for other errors in the said record and proceedings being may be re-
versed, annulled, and altogether holden for nought, and that he may be
restored to all things which he hath lost by occasion of the said judgment.

(c) Pleadings, &c.]—The defendant in error must plead to the assignment of error, within eight days, the bar by lapse

Str. 819; *Franklyn v. Reeves*, Hardw. 118; *Winchcomb v. Goddard*, Cro. Eliz. 836.

(1) *Helbut v. Held*, 2 Str. 685; *Bradburn v. Taylor*, 1 Wils. 85.

(2) *Coan v. Bowles*, Carth. 124; *De Tastet v. Racket*, 3 B. & B.

65.

(*) 21 Edw. 4, 38.

(c) *Fishmongers' Company v. Dimsdale*, 6 C. B. 896; F. N. B. 20
184; *Burdett v. Wheatley*, 2 Lord Raym. 883; *Jeffrey v. Wood*,
184. 439.

(^b) *Sparding v. Greville*, 2 D. & L. 721.

(6) *Bevan v. Cheshire*, 3 Dowl. 70.

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of time, release of error, or other like matter of fact.⁽¹⁾ To the plea the plaintiff in error may reply, and the defendant in error rejoin, &c., as in the pleadings of the action below, no rule to plead in any case being necessary, and either party being entitled to give to the opposite party a notice to answer the previous pleading in "four days otherwise judgment," which notice may either be delivered separately or indorsed on the pleading.⁽²⁾ The issue is made up and the cause carried down to trial as in ordinary cases, except that the defendant may carry it down without waiting for a default.⁽³⁾ If the pleadings to the assignment should terminate in an issue of law, it is determined as an ordinary demurrer.⁽⁴⁾

(d) *Entry of judgment.*—After verdict the proper mode of proceeding is to put the cause in the paper for argument, and four days thereafter move the court for a reversal or affirmance of the judgment according to the finding.⁽⁵⁾

(e) *Assignment of error in fact.*—We have already enumerated (*ante*, p. 539) the matters of fact which may be assigned as error. Only one matter of fact can be assigned.⁽⁶⁾ Where the plaintiff in the original suit dies before verdict or interlocutory judgment is assigned, the assignment should conclude with a prayer for a *scire facias ad audiendum errores*.⁽⁷⁾

(f) *Form of assignment.*—In the following form the error assigned is the coverture of the defendant at the time of bringing the action.

In the Q. B., ["C. P.," or "Exch. of P."]

On the day of A.D.

C. D. & Wife } Afterwards, to wit, on the day of A.D.
v. } comes here C. D. and E. his wife, which said E. was
A. B. } and is impleaded in this suit by the name of E. F.,
in their proper persons, and say that in the record and proceedings
aforesaid, and also in giving the judgment aforesaid there is manifest
error, in this, to wit, that before the day of the commencement of the
said suit of the said A. B. against the said E. by the name of E. F.,

(¹) C. L. P. Act, 1852, s. 152.

(*) Reg. Gen. H. T. 1853 (Pr.) r. 65.

(*) Tidd. Pr. 175.

(4) Lush. Pr. 512, 2nd edit.

(5) *Jackson v. Marshall*, 3 Com. L. R. 292; *Sexton v. Astor*, 1 Dowl. N. S. 141; 1 Chit. Arch. 523, 8th edit.

(c) F. N. B. 45 (c.)

(1) *Dore v. Darkin*, T. Raym. 69; *Edmonds v. Probert*, Carth. 339.

and before the giving of the judgment aforesaid, to wit, on at aforesaid, the said E. intermarried with and took to husband the said C. D., and that she, the said E., at the time of the commencement of the said suit, and also at the time of giving the judgment aforesaid was and yet is covert of the said C. D. then and yet her husband, to wit, at aforesaid. Therefore in that there is manifest error, and this the said C. D. and E. his wife are ready to verify, wherefore they pray that the judgment aforesaid for the error aforesaid may be revoked, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the judgment aforesaid, &c.

(g) *Notice to plead.*]—By Reg. Gen., H. T., 1853, (Pr.) r. 65, “no rule to plead to assignment of error in fact, or any other pleading, shall be necessary, but either party may give to the opposite party a notice to answer such pleading within four days, otherwise judgment; which notice may be delivered separately or indorsed on the pleadings.” If the notice be disregarded, the court upon motion will reverse the judgment.⁽¹⁾

(h) *Joinder in error and pleas.*]—The defendant in error may plead specially, confessing and avoiding the fact assigned, and concluding with a verification, or generally denying and concluding to the country, or *in nullo est erratum*, which confesses the fact assigned, but denies that it is error, or he may demur.⁽²⁾ Pleas setting up a release of errors,⁽³⁾ or the bar by lapse of time⁽⁴⁾ should conclude by praying that the plaintiff may be barred of his error, and not that the judgment be affirmed.⁽⁵⁾ The common joinder in error answers the same purpose as a demurrer.

(i) *Form of plea.*]—The following specimen of a plea is to the above assignment.

		The	day of	A. D.	.
A. B.	}	And hereupon the said A. B., by P. A., his attorney,			
ats.		freely here in court comes and says, that by reason of			
C. D.		anything above for error assigned the judgment aforesaid ought not to be revoked, annulled, or held for nothing; because he			

⁽¹⁾ *Walmsley v. Roson*, 2 Str. 1210; *Thatcher v. Stephenson*, 1 Str. 144.

⁽²⁾ See *Sheepshanks v. Lucas*, 1 Burr. 410; *Grell v. Richards*, 1 Lev. 294; *Okeover v. Overbury*, T. Raym. 231; *Evans v. Roberts*, 3 Salk. 147.

⁽³⁾ *Davenant v. Raftor*, 2 Lord Raym. 1046; *Hacket v. Herne*, 3 Mod. 135; *Cole's case*, Latch. 110.

⁽⁴⁾ *Street v. Hopkinson*, 2 Str. 1055.

⁽⁵⁾ *Cunningham v. Houston*, 1 Str. 127.

says that the said E., at the time of the commencement of the said suit aforesaid, was not nor is covert of the said C. D. in manner and form as the said C. D. and E. have above alleged, and of this he, the said A. B. puts himself upon the country, &c.

(*k*) *Trial.*]—Notice of trial and all other proceedings thereon are the same as in issues joined in an ordinary action.⁽¹⁾

(*l*) *Judgment.*]—The common judgment for the defendant in error is that the judgment be affirmed; and it is the same on a demurrer to the assignment of error.⁽²⁾ But if on a plea of the lapse of time,⁽³⁾ or a release of errors,⁽⁴⁾ it is that the plaintiff be barred of his error.

IV. OF ERROR TO THE HOUSE OF LORDS FROM THE JUDGMENT OF THE EXCHEQUER CHAMBER.

- | | |
|---|--|
| 1. Suggestion of error, &c. | 4. Drawing up and delivering copies of case. |
| 2. Assignment of errors. | 5. Argument. |
| (a) Joinder in error where errors assigned. | 6. Judgment. |
| 3. Motion for hearing. | 7. Costs. |

1. *Suggestion of error, &c.*]—Error, as we have seen, lies from an affirmance or reversal of the judgment below in the Exchequer Chamber to the House of Lords. As the proceedings are almost identically the same as in the case of error to the Exchequer Chamber, we have in treating of the various steps in error in law, pointed out the particulars in which any difference occurred. The House of Lords and the Court of Exchequer Chamber have the same powers of affirmance, reversal, or varying of the judgment below. The judgment roll, as has been already pointed out, is without any writ or return brought by the Master into the High Court of Parliament before or at the time of its sitting; and the proceedings and judgment as altered or affirmed are entered on the original record,⁽⁵⁾ and the judgment roll is then returned to the court in which the original judgment was given.⁽⁶⁾ The following points peculiar to the proceedings in the House of Lords must however be noted.

(1) Rule Pr. 66, H. T. 1853.

(2) *Jeffrey v. Wood*, 1 Str. 439.

(3) *Strest v. Hopkinson*, 2 Str. 1055.

(4) *Dent v. Lingwood*, 2 Str. 683; *Keris v. Clifton*, 3 Salk. 214.

(5) C. L. P. Act, 1852, s. 155.

(6) *Lane v. Hooper*, 3 E. & B. 731.

2. *Assignment of errors.*]—In cases where an assignment of errors is necessary, the following form may be adopted :—

In the House of Lords.

C. D., Plaintiff in error.

A. B., Defendant in error.

Afterwards, that is to say, on the day of before our Lady the Queen, and the Lords spiritual and temporal in Parliament assembled, comes the said C. D. by A. B., his attorney, and says that in giving [*or if there were an affirmance by a court of intermediate jurisdiction, "in giving and affirming," or if there were a reversal "in reversing"*] the judgment aforesaid, there is manifest error in this, that [*&c. state the errors*] and the said C. D. prays that the judgment aforesaid, [*or "the judgment and affirmance thereof aforesaid," or "the said judgment of reversal" as the case may be*] may be reversed, annulled, and altogether holden for nought, and that he may be restored to all things which he has lost by occasion of the said judgment complained of.

(a) *Joinder in error where errors assigned.*]—If, after assignment of errors, the defendant in error do not appear, the plaintiff in error may present a petition requiring him to plead, and praying that if he make default either the judgment be reversed, or the cause be set down *ex parte*, and that service of the order on the attorney of the defendant in error be sufficient.⁽¹⁾ The following is the form of joinder in error where errors are assigned :—

In the House of Lords.

C. D., plaintiff in error.

A. B., defendant in error.

And hereupon the said A. B., by P. O., his attorney, comes and says, that there is no error in giving [*or if there were an affirmance by a court of intermediate jurisdiction "in giving and affirming," or if there were a reversal "in reversing"*] the judgment aforesaid; and he prays that the court of our Lady the Queen, in her Parliament here, may proceed to examine as well the records and proceedings aforesaid, as the matters aforesaid assigned for error; and that the judgment aforesaid [*or if there were an affirmance by a court of intermediate jurisdiction, "the judgment and affirmance thereof aforesaid," or if there were a reversal, "the said judgment of reversal"*] in manner aforesaid given, may be in all things affirmed, &c.

The following words are usually added :—

But because the said court of our said Lady the Queen in her Parliament here are not yet advised what judgment to give of and upon the premises, a day is therefore given to the parties aforesaid here, until to hear judgment thereon; for that the said court of our said Lady the Queen in her said Parliament here are not yet advised thereof, &c.

⁽¹⁾ Macq. Pr. H. of L. 411.

3. *Motion for hearing.*]—To procure the setting down of the cause for hearing, a motion must be made for that purpose by a peer, and it will be set down in the list of causes and taken in its turn. But to procure its being taken out of its turn, a petition must be presented to the House, of which two days previous notice must be given to the opposite party. The motion is that it be referred to a committee : and the House acts upon the report of the committee so appointed.⁽¹⁾

4. *Drawing up and delivering copies of case.*]—The case must be drawn up and signed either by the counsel engaged below or those who are to argue it in Parliament :⁽²⁾ and each side must deliver one hundred printed copies at the parliament office, for the use of the peers, at least four days before the hearing.⁽³⁾

5. *Argument.*]—Two counsel are heard on each side. Those for the plaintiff begin, and the senior counsel for the plaintiff is heard in reply.⁽⁴⁾

6. *Judgment.*]—After the argument the Lord Chancellor delivers his opinion, and moves that the judgment be either affirmed or reversed. The other peers then deliver their opinion, if they wish. The affirmance or reversal is decided by the votes of the peers present, no proxies being allowed, and if the votes be equal the judgment is affirmed.⁽⁵⁾

7. *Costs.*]—As a general rule, no costs are given to the plaintiff in error.⁽⁶⁾ And the court in which the action is pending has no power to give the costs of the proceedings in the House of Lords.⁽⁷⁾ Where the House orders the costs to be paid by either party, the clerk of the Parliament, or clerk-assistant, will, upon application, appoint a person to tax the costs.⁽⁸⁾

(1) Ord. D. P. 22nd Dec. 1703.

(2) *Ibid.* 19th April, 1698.

(3) Lords' S. O. cxv.

(4) See Ord. D. P. 2nd March, 1727.

(5) *Thornby v. Fleetwood*, 1 Str. 381.

(6) Macq. Pr. H. of L. p. 420.

(7) *Veale v. Thompson*, 2 M. & S. 249.

(8) Lords' S. O. No. cxxxviii; see also Order, 4 Mar. 1851.

V. OF THE PROCEEDINGS WHERE PARTY DIES.—OF CONFESSION AND DISCONTINUANCE.—OF QUASHING THE PROCEEDINGS—AND OF BAIL IN ERROR.

- | | |
|---|--|
| 1. Where party dies or female party is married pending the error. | 3. In what cases proceedings in error quashed. |
| 2. Of discontinuance and confession. | 4. Bail in error. |

1. *Proceedings where Party dies, or Female Party is married pending the Error.*

(a) *Death of plaintiff or one of several plaintiffs.*—Formerly a writ of error abated where the plaintiff in error died before error assigned, but now, by the C. L. P. Act, 1852, s. 161, the death of a plaintiff in error after service of the note of the receipt of the memorandum alleging error, with a statement of the grounds of error, shall not cause the proceedings to abate, but they shall be continued as hereinafter mentioned. In case of the death of one of several plaintiffs in error, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may be thereupon continued at the suit of and against the surviving plaintiff in error, as if he were the sole plaintiff.⁽¹⁾ In case of the death of a sole plaintiff, or of several plaintiffs in error, the legal representative of such plaintiff, or of the surviving plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may thereupon be continued at the suit of and against such legal representative as the plaintiff in error; and if no such suggestion shall be made, the defendant in error may proceed to an affirmance of the judgment, according to the practice of the court, or take such other proceedings thereon as he may be entitled to.⁽²⁾

(b) *Death of defendant or of one of several defendants.*—The death of a defendant in error shall not cause the proceedings to abate, but they may be continued as hereinafter mentioned.⁽³⁾ In case of the death of one of several de-

(1) C. L. P. Act, 1852, s. 162.

(2) *Ibid.* s. 163; see *St. Catherine's Dock Company v. Higgs*, 10 Q. B. 852.

(3) C. L. P. Act, 1852, s. 164.

fendants, in error, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the proceedings may be continued against the surviving defendant.⁽¹⁾ In case of the death of a sole defendant or of all the defendants in error, the plaintiff in error may proceed upon giving ten days' notice of the proceedings in error, and of his intention to continue the same, to the representatives of the deceased defendants, or if no such notice can be given then, by leave of the court or a judge, upon giving such notice to the parties interested as he or they may direct.⁽²⁾

(c) *Marriage of female party.*]—The marriage of a woman, plaintiff or defendant in error, does not abate the proceedings in error, but the same may be continued in like manner as provided with reference to the continuance of an action after marriage.⁽³⁾ The proceedings are continued to judgment, and such judgment may be executed against the wife alone; or, by suggestion or writ of revivor, judgment may be obtained against the husband and wife, and execution issue thereon; and, in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband, without any writ of revivor or suggestion.⁽⁴⁾

2. Of Discontinuance, and Confession of Error.

(a) *Discontinuance.*]—A plaintiff in error, whether in fact or law, is at liberty to discontinue his proceedings by giving the defendant in error a notice, headed in the court and cause, and signed by the plaintiff in error or his attorney, stating that he discontinues such proceedings; and thereupon the defendant in error may sign judgment for the costs of, and occasioned by, the proceedings in error, and may proceed upon the judgment on which the error was brought.⁽⁵⁾ This will not preclude the plaintiff in error from commencing proceedings in error anew, provided he recommence them within the time limited for alleging error. The following form of notice is suggested:—

(1) C. L. P. Act, 1852, s. 165.

(2) *Ibid.* s. 166.

(3) *Ibid.* s. 167.

(4) *Ibid.* s. 143.

(5) *Ibid.* s. 159.

The day of A.D. .

In the Court of Q. B. ("C. P." or "Exch. of Pleas.")

A. B. plaintiff in error,	}	Take notice that the plaintiff in error in this cause will henceforth discontinue all proceedings herein.
and		
C. D. defendant in error.		

(Signed) A. B. [or G. H., attorney of]
 plaintiff in error.

To C. D. [or E. F., attorney of] defendant in error.

(b) *Confession.*]—The defendant in error, whether in fact or law, is at liberty to confess error, and consent to the reversal of the judgment, by giving to the plaintiff in error a notice, headed in the court and cause, and signed by the defendant in error or his attorney, stating that he confesses the error, and consents to the reversal of the judgment; and thereupon the plaintiff in error is entitled to and may forthwith sign a judgment of reversal.⁽¹⁾ If there are several defendants in error, the error must of course be confessed by all, otherwise it would seem that reversal of the judgment could not be signed. The notice may be in the following form:—

The day of A.D. .

In the Court of Q. B. ("C. P." or "Exch. of Pleas.")

C. D. defendant in error,	}	Take notice that the defendant in error in this cause confesses the error alleged, and consents to the reversal of the judgment.
and		
A. B. plaintiff in error.		

(Signed) C. D. [or E. F., attorney of the]
 defendant in error.

To A. B. [or G. H., attorney of] the plaintiff in error.

3. In what cases Proceedings in Error quashed.

(a) *Where error does not lie.*]—Courts of error may quash the proceedings in error in all cases in which error does not lie.⁽²⁾ This power was exercised by courts of error before the act.⁽³⁾ In one case the proceedings were quashed so far as they related to the original judgment, and were ruled to stand good *quoad* a judgment on *scire facias* against the bail in it, both judgments being impeached by the error.⁽⁴⁾

(b) *Where proceedings taken against good faith.*]—The

⁽¹⁾ C. L. P. Act, 1852, s. 160.

⁽²⁾ *Ibid.* s. 156.

⁽³⁾ *Snook v. Mattock*, 5 A. & E. 239.

⁽⁴⁾ *Burr v. Attwood*, Carth. 447; S. C. 1 Lord Raym. 328.

proceedings may also be quashed by the court of error where they are taken against good faith.⁽¹⁾ Before the act courts of error had no jurisdiction to quash the proceeding on this ground;⁽²⁾ but the court below was in the habit of doing so; and the cases in which they exercised such power will constitute so many precedents for the exercise of the same jurisdiction by the court of error. Thus it has been held that where a party or his attorney have entered into an agreement not to bring error, he is precluded from bringing it, though there be manifest error in the record.⁽³⁾ Where the defendant's attorney agreed not to bring error in the action, it was held that the defendant's executors could not bring error on a judgment in a *scire facias* which was brought against them to revive the judgment upon the death of the defendant.⁽⁴⁾ So, if a defendant obtain time to plead upon the condition of giving judgment of the term; as this must be deemed an undertaking to give an available judgment, if the defendant bring error, the court upon application will quash the proceedings.⁽⁵⁾

(c) *Quashing proceedings in other cases.*]—Power to quash proceedings in the above two cases is expressly given by the C. L. P. Act, 1852, s. 156, and it further provides that courts of error shall have the same power “in any case in which proceedings in error might heretofore have been quashed by such courts; and such courts shall in all respects have such jurisdiction over the proceedings as over the proceedings in error commenced by writ of error.” The power of courts of error, before the new practice, to quash the writ of error, was limited to cases where some defect was apparent on the face of the writ, or where the record brought up was inconsistent with it;⁽⁶⁾ as where there was no judgment when the writ of error was returnable,⁽⁷⁾ or no final judgment upon the whole record returned, and so nothing for the writ to operate upon.⁽⁸⁾ The power of the

(1) C. L. P. Act, 1852, s. 156.

(2) *Gerrard dem. Tuck ten.* 8 C. B. 258.

(3) *Baddley v. Shafto*, 8 Taunt. 438; *Best v. Lord Granville*, 2 Dowl. 796.

(4) *Executors of Wright v. Nutt*, 1 T. R. 388.

(5) *Cave v. Massey*, 3 B. & C. 375; see also *Apothecaries Company v. Harrison*, 12 A. & E. 642.

(6) *Gerrard dem. Tuck ten.* 8 C. B. 258.

(7) *King v. Simmonds*, 7 Q. B. 289; *Wilson v. Ingoldsby*, 2 Lord Raym. 1179; *Regindoz v. Randolph*, 2 Str. 834.

(8) *Jolson v. Kaye*, 6 M. & G. 536. ;

courts of error to quash proceedings is confined to cases in which they may have done so before the act, such as the above, and a court of error cannot, therefore, quash the proceedings on the ground they have been taken for the purpose of delay, or for any other defect not apparent on the face of the proceeding,⁽¹⁾ except that error does not lie, or that proceedings are against good faith. But possibly the court below may still have jurisdiction in such a case.⁽²⁾

(d) *Mistake of officer.*—Where it appeared that the ground of error originated in a mistake of the officer of the court below in entering the judgment, the court of error allowed the case to stand over that the parties might apply to the court below to amend the error.⁽³⁾

(e) *Costs.*—Where the proceedings are quashed, the plaintiff in error is liable to pay the costs, including the costs of quashing the proceedings, although no costs were recoverable in the original action.⁽⁴⁾ But if the proceedings were rendered defective by the acts of the defendant in error, he will not be allowed his costs, and will be compelled to pay the plaintiff his costs.⁽⁵⁾

Security for costs.—A court of error will sometimes require the plaintiff in error to give security for costs; as where, being plaintiff below and residing abroad, he has given security for the costs below, and the costs below have more than exhausted the security;⁽⁶⁾ or where being defendant below, he dies insolvent pending the proceedings in error.⁽⁷⁾

4. Bail in Error.

(a) *In what cases bail in error requisite.*—We have seen

⁽¹⁾ This was no doubt an oversight in the framers of the act; the intention evidently being to enable courts of error to quash the proceedings in every case in which they had before been quashed.

⁽²⁾ See *Reg. v. Broome*, 4 D. & L. 607; *Reg. v. Alleyne*, 4 E. & B. 186.

⁽³⁾ *Gregory*, app., *Duke of Brunswick*, resp., 2 H. of L. Cases 415.

⁽⁴⁾ 4 Anne, c. 16, s. 25; *Ginger v. Cowper*, 2 Lord Raym. 1403; *McNamara v. Fisher*, 8 T. R. 302.

⁽⁵⁾ *Regindoz v. Randolph*, 2 Str. 834; *Gould v. Conethurat*, 1 Str. 129.

⁽⁶⁾ *Bongleux v. Swayne*, 3 E. & B. 829.

⁽⁷⁾ *Haygarth v. Wilkinson*, 12 Q. B. 851.

that proceedings in error in law are deemed a supersedeas of execution from the time of the service of the copy of the Master's receipt of the memorandum of error, together with the statement of the grounds of error intended to be argued, until the proceedings in error are disposed of, or there be default in putting in of bail. The 151st section of the C. L. P. Act, 1852, enacts that "upon any judgment hereafter to be given in any of the said superior courts of common law in any action, execution shall not be stayed or delayed by proceedings in error or supersedeas thereupon, without the special order of the court or a judge, unless the person in whose name such proceedings in error be brought, with two, or by leave of the court or a judge, more than two sufficient sureties, such as the court wherein such judgment is or shall be given or a judge shall allow of, shall, within four clear days after lodging the memorandum alleging error, or after signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the party for whom any such judgment is or shall be given." Bail in error is, therefore, now necessary in nearly all cases where error is brought on a judgment in the superior courts, unless it be otherwise ordered by the court or a judge. But it is only necessary where the error is brought by the defendant in the original action; where, therefore, the plaintiff in error was the plaintiff below, it is not requisite that he should give bail.⁽¹⁾ And no bail need be given where the error is in fact, and the proceedings in the court in which the original judgment was given,⁽²⁾ unless required by the court or a judge.⁽³⁾ But where the error is in law and the proceedings in a court of error, bail in error is requisite, although there be real error in form on the face of the record;⁽⁴⁾ unless the court or a judge dispense with it, the application for which purpose must be founded on a special affidavit of facts, showing not only that the proceedings in error have been taken *bonâ fide*, and not merely for the purpose of delay, but also that it is for the furtherance of justice that the security of bail should not be insisted on.⁽⁵⁾ Money cannot be paid into court in lieu of bail in error, unless by consent.⁽⁶⁾

(1) *James v. Cochran*, 9 Exch. 552.

(2) *Levy v. Price*, 2 M. & W. 533.

(3) *Birch v. Triste*, 8 East, 412.

(4) *Wadsworth v. Gibson*, 1 Moo. & P. 501.

(5) *Williams v. Dowman*, 2 Dowl. & L. 131; *Duvergier v. Fellowes*, 1 Dowl. 224; *Freeman v. Garden*, 1 D. & R. 184.

(6) *Collins v. Gwynne*, 2 Scott N. R. 85; 9 Dowl. 70.

(b) *Within what time bail must be put in.*—The plaintiff in error has four *clear* days⁽¹⁾ after lodging the memorandum alleging error, or after the signing of judgment, whichever shall last happen, for putting in bail; or he may do so before execution.⁽²⁾ If bail be not put in within the time specified, the defendant in error may immediately sue out execution.⁽³⁾ The court or a judge may, but will not in general, extend the time for putting in bail.⁽⁴⁾

(c) *Who may be bail.*—Bail in the original action may be bail in error.⁽⁵⁾ Members of a corporation may be bail in error for the corporation.⁽⁶⁾

(d) *Form of recognizance.*—There must be two sufficient sureties, unless the court or a judge allow more to be joined. The recognizance must be acknowledged in the court in which the original judgment was given, and is in double the sum adjudged to be recovered by the judgment, (except in the case of a penalty; and in the case of a penalty in double the sum really due, and double the costs,) and the condition is, to prosecute the proceedings in error with effect, and also to satisfy and pay, if the judgment be affirmed, or the proceedings in error be discontinued by the plaintiff therein, all and singular the sum and sums of money and costs adjudged or to be adjudged upon the former judgment, and all costs and damages to be also awarded for the delaying of execution.⁽⁷⁾ It is not necessary for the plaintiff in error to join in the recognizance.⁽⁸⁾ Bail in error cannot, it seems, be put in before a commissioner in the country.⁽⁹⁾ The following is the form of the recognizance:—

You B. B. and J. B. do jointly and severally acknowledge to owe unto A. B. the sum of £ [double the sum adjudged to be recovered by the judgment, except in the case of a penalty, and in the case of a penalty in double the sum really due, and double the costs] to be levied

⁽¹⁾ See *Gravall v. Stimpson*, 1 B. & P. 478; *Bennett v. Nicholls*, 4 T. R. 121; *Blackburn v. Kymmer*, 5 Taunt. 672.

⁽²⁾ C. L. P. Act, 1852, s. 151.

⁽³⁾ ——— *v. Nichols*, 2 Ch. R. 106; *Incedon v. Clarke*, Barnes, 212.

⁽⁴⁾ *Pigott v. Dunn*, 1 D. & Ry. 9; 1 Dowl. 32; *Handasyde v. Morgan*, 2 Wils. 144.

⁽⁵⁾ *Martin v. Justice*, 8 T. R. 639.

⁽⁶⁾ *Henley v. Mayor of Lynn Regis*, 6 Bing. 195.

⁽⁷⁾ C. L. P. Act, 1852, s. 151.

⁽⁸⁾ *Dixon v. Dixon*, 2 B. & P. 443.

⁽⁹⁾ *Williams v. Panton*, 8 Dowl. 701.

upon your several lands and tenements, goods and chattels, upon condition that C. D. shall prosecute the proceedings in error herein into the Court of Exchequer Chamber with effect, and also shall satisfy and pay if the judgment given in the Court of Q. B. [or "C." P. or "Exch. of P."] be affirmed, or the proceedings in error be discontinued by the said C. D., all and singular the sum or sums of money and costs adjudged or to be adjudged upon the said judgment so as aforesaid given herein, and all such costs and damages as shall be also awarded for the delaying of execution.

(e) *Notice of bail.*—After bail is put in, the plaintiff in error should forthwith give notice thereof to the defendant in error or his attorney,⁽¹⁾ and care should be taken that it be given within four clear days after the lodging the memorandum alleging error, or signing of judgment, whichever may have last happened, otherwise the plaintiff in the original action may sue out execution.⁽²⁾ Notice of more bail than two is deemed irregular, unless by order of the court or a judge, and the bail, of whom notice is given, cannot be changed without leave of the court or a judge.⁽³⁾ The notice of bail must, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder.⁽⁴⁾ The provisions in the Rules of H. T. 1853, enabling bail to be justified by accompanying the notice with an affidavit of the bail does not appear to be applicable to bail in error.⁽⁵⁾

(f) *Form of notice.*—The following is a form of the notice of bail :—

In the Q. B. [or "C. P." or "Exch. of P."]

Between A. B., plaintiff,
and

C. D., defendant.

Take notice, that special bail was this day put in with _____, one of the Masters of _____, upon the proceedings in error in this cause, before the Hon. Mr. Justice [or "Baron"] _____, at his chambers in Rolls Garden, London, and the names, additions, and particulars of and relating to such bail, are as follows: The said bail are J. B., of No. _____, street, in the county of _____, who is a housekeeper

(1) C. L. P. Act, 1852, s. 151.

(2) *Attenbury v. Smith*, 2 D. & R. 85.

(3) Rules Pr. 91, 92, H. T. 1853.

(4) Rule Pr. 97, H. T. 1853.

(5) See Rules Pr. 98, 99, 100, H. T. 1853.

there, and F. L., of No. , place, in the said county of , and who is a housekeeper there, and who is also a freeholder of a messuage and land in the parish of , in the county of , which is now in the possession of his tenant; and the said J. B. hath resided for the last six months at No. , street, aforesaid, and the said F. L., in the month of last, resided continuously at No. , street, in the county of , until on or about the day of last, and on or about that day he removed from thence to No. , street, aforesaid, and hath there resided continuously until this day.

(g) *Exception to bail.*—The bail must be excepted to within twenty days next after the putting in of the bail, and the notice, in writing, given to the defendant in error or his attorney, and no exception to bail is admitted after that time.⁽¹⁾ For this purpose a rule for better bail must be obtained from one of the Masters of the court in which the judgment was given, and served on the plaintiff in error or his attorney. The rule may be in the following form:—

A. B. v. C. D. in error.	}	Unless the plaintiff in error in this cause puts in better bail within four days next after notice hereof given to the said plaintiff or his attorney, execution will issue.
		M. A., [<i>name of Master.</i>]

(h) *Justifying bail.*—The bail is justified, when required, within four days after exception before a judge at chambers, both in term and vacation,⁽²⁾ otherwise execution may be issued.⁽³⁾ If either of the sureties do not justify, his name may be struck out on application to a judge.⁽⁴⁾ They are considered, however, as bail, and may be proceeded against as such until they are exonerated.⁽⁵⁾ The mode of justifying bail is the same as in the original action, as to which, and the liability of bail in error, and the modes of proceeding against them, see *post*, title “Bail.”

Form.—The following is a form of the notice of justification of bail:—

In the Q. B. [*or “C. P.” or “Exch. of Pleas.”*]

Between A. B., plaintiff
and

C. D., defendant, (in error.)

Take notice that B. B. and J. B., the bail already put in on the

⁽¹⁾ Rule Pr. 100, H. T. 1853.

⁽²⁾ Rule Pr. 103, H. T. 1853.

⁽³⁾ *Gould v. Holmestrom*, 7 East, 580.

⁽⁴⁾ *Jones v. Tubb*, 1 Wils. 387.

⁽⁵⁾ *Adrian v. Wilks*, 6 B. & C. 237; *Dickenson v. Heseltine*, 2 M. & S. 210.

proceedings in error in this cause, and of whom you have before had notice, will, at the hour of o'clock in the forenoon, on next, justify themselves before the Hon. Mr. Justice [or "Baron,"] , or such other judge as shall be then sitting in chambers in Rolls Garden, London, as good and sufficient bail for the said defendant in this action in the proceedings in error herein. Dated the day of , 18 .

Yours, &c.,

O. A., defendant's attorney.

To Mr. P. A., plaintiff's attorney.

(i) *Bond in ejectment.*—Where judgment is given for the claimant in ejectment, and error is brought by the defendant below, which it may be after a special verdict found by the jury, or a bill of exceptions, or by consent after a special case stated, except in the case of such consent, the plaintiff in error must, in order to stay execution, within four clear days after lodging the memorandum alleging error, or after signing of the judgment, whichever shall last happen, or before execution executed, be bound unto the claimant, who shall have recovered judgment in such action of ejectment in double the yearly value of the property, and double the costs recovered by the judgment, with condition, that if the judgment shall be affirmed by the court of error, or the proceedings in error be discontinued by the plaintiff therein, then the plaintiff in error shall pay such costs, damages, and sum or sums of money as shall be awarded upon or after such judgment affirmed or discontinuance.⁽¹⁾ The bond may be readily framed, adopting in the condition the words given by the act as nearly as may be.

Writ of false judgment.—The writ of false judgment is in the nature of the old writ of error, and is an original writ issuing out of Chancery, and it lies where an erroneous judgment is given in a court, not of record, where proceedings are according to the course of the common law, in which the suitors are judges.⁽²⁾ Since the abolition of the old County Courts, and of others of a similar description, there are few, if any, cases to which it can apply, and a more lengthened consideration of it is, therefore, unnecessary.

⁽¹⁾ C. L. P. Act, 1852, s. 208.

⁽²⁾ Fitz. N. B. 18.

CHAPTER XXVII.

EXECUTION ON JUDGMENTS.

I. OF WRITS OF EXECUTION, AND THEIR DIRECTION, TESTE, AND INDORSEMENT.

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| 1. Out of what court and when writs of execution may be issued, and of the forms of writs of execution. | 2. Of the direction of writs of execution.
3. Teste and return day of writ.
4. The indorsement of writs of execution. |
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II. OF THE RENEWAL AND SUCCESSION OF WRITS, OF THEIR EXECUTION, OF THE POUNDAGE FEES, AND EXPENSES OF EXECUTION, AND OF THE AMENDING AND SETTING ASIDE OF IRREGULAR WRITS.

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| 1. Of the renewal and succession of writs of execution, and from what time they bind the property of the debtor.
2. Of the sheriff's warrant to execute, and where, when, and how writs must be executed.
3. Of the execution of the writ of <i>feri facias</i> .
4. Of the execution of the writ of <i>elegit</i> .
5. Of the execution of the writ of | <i>capias ad satisfaciendum</i> .
6. Of execution in <i>detinuit</i> .
7. Of execution where matter of account decided by the court or a judge, or referred under the C. L. P. Act, 1854, s. 3.
8. Of the poundage, fees and expenses of execution.
9. Of the amendment and the setting aside of irregular writs, and restitution where judgment set aside. |
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III. OF THE RETURN OF WRITS, AND ATTACHMENT FOR NOT RETURNING.

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| 1. Of the rule to return.
2. Of the return. | 3. Of the attachment for not returning. |
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1. *Out of what Court and when Writ may be issued, and of the form of Writs of Execution.*

Out of what court execution issues.]—Writs of execution

are judicial writs, issuing out of the court where the record or other proceeding is upon which they are grounded.⁽¹⁾ Where the record or transcript is removed from an inferior into the superior courts, execution is issued out of the latter;⁽²⁾ but in case of error being brought, execution issues out of the court in which the original judgment was given, for the record remains there.⁽³⁾ Where issues of fact are tried without a jury, execution issues upon the judgment in the same manner as in ordinary cases.⁽⁴⁾ And where matter of account is decided summarily by a judge, or is referred to arbitration under the C. L. P. Act, 1854, the decision of the judge or the award or certificate of the referee, is enforceable by the same process as the finding of a jury on the matter referred, and forms of writs of execution are given by the Reg. Gen. M. V. 1854, schedules 9 and 10. Execution may be issued out of the superior courts at Westminster on judgments of the Common Pleas at Lancaster,⁽⁵⁾ or the Court of Stannaries in Cornwall;⁽⁶⁾ but a judgment in the County Court cannot be removed for the purpose of issuing execution thereon.⁽⁷⁾

When may be issued.—As soon as final judgment is signed, execution may be issued out.⁽⁸⁾ A plaintiff or defendant, having obtained a verdict in a cause tried out of term, is entitled to issue execution in fourteen days; and where a plaintiff or defendant has obtained a verdict in term, or in case a plaintiff has been nonsuited at the trial in or out of term, judgment may be signed and execution issued thereon in fourteen days; unless in either case the judge who tries the cause, or some other judge, or the court, shall order execution to issue at an earlier or later period, with or without terms.⁽⁹⁾ The judge who tries the cause may certify for immediate or speedy execution.⁽¹⁰⁾ In case of non-appearance, where the writ is specially indorsed, the plaintiff may sign judgment and issue execution at the

(1) 2 Wms. Saund. 27.

(2) See 19 Geo. 3, c. 70, s. 4; 1 & 2 Vict. c. 110, s. 22.

(3) Reg. Gen. M. V. 1854, sched. 8.

(4) Reg. Gen. M. V. 1854, scheds. 9 and 10.

(5) 4 & 5 Will. 4, c. 62, s. 31.

(6) 6 & 7 Will. 4, c. 106, s. 11.

(7) *Moreton v. Holt*, 24 L. J. 169, Exch.

(8) *Finch v. Brook*, 5 Dowl. 59.

(9) C. L. P. Act, 1852, s. 120; Reg. Gen. H. T. 1853 (Pr.) r. 57.

(10) 1 Will. 4, c. 7, s. 2; *Lander v. Gordon*, 7 M. & W. 218.

expiration of eight days from the last day for appearance.⁽¹⁾ Should the last of the eight days fall on a Sunday, it is, nevertheless, to be reckoned in the computation.⁽²⁾ At the return of a writ of inquiry, judgment may be signed at the expiration of four days from such return,⁽³⁾ and execution may thereupon issue. The practice is similar upon the Master's indorsement of damages, where it is referred to him to ascertain them.⁽⁴⁾ On the return of a writ of trial, judgment may be signed and execution issued forthwith, unless there be a certificate on the trial preventing it.⁽⁵⁾ And where debts due to a judgment debtor are attached in the hands of a garnishee, who admits the debts or makes default in appearing to the summons, the judge may order execution to issue, and it may be issued forthwith accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt.⁽⁶⁾ But execution must be sued out within a year and a day after signing of judgment; ⁽⁷⁾ unless there was a stay of execution, then within the same period after the execution could first have been issued. After a year and a day a *sci. fa.* is necessary; ⁽⁸⁾ unless defendant agreed to waive it.⁽⁹⁾ Where there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had by or against the others without a *scire facias*; but the execution should be taken out in the joint names of all the plaintiffs or defendants.⁽¹⁰⁾ No *sci. fa.* is necessary before issuing execution on a decree, rule, or order, under 1 & 2 Vict. c. 110, s. 18, although more than a year and a day has elapsed since the making of it.⁽¹¹⁾ No execution can issue pending an action on the judgment.⁽¹²⁾ And proceedings in error operate as a supersedeas of execution.⁽¹³⁾

(1) C. L. P. Act, 1852, s. 27.

(2) *Rowberry v. Morgan*, 9 Exch. 730.

(3) Reg. Gen. H. T. 1853 (Pr.) r. 55.

(4) C. L. P. Act, 1852, s. 94.

(5) 3 & 4 Will. 4, c. 42, s. 18.

(6) C. L. P. Act, 1854, s. 63.

(7) 13 Edw. 1, stat. 1, c. 45.

(8) *Blanchenay v. Burt*, 4 Q. B. 707.

(9) *Hiscocks v. Kemp*, 3 A. & E. 676; *Morgan v. Burgess*, 1 Dowl. N. S. 850.

(10) *Rolt v. The Mayor &c. of Gravesend*, 7 C. B. 777; *Pennoyre v. Bruce*, Lord Raym. 244.

(11) *Re Spooner v. Payne*, 11 Q. B. 136.

(12) *Burdus v. Satchwell*, Barnes, 208.

(13) C. L. P. Act, 1852, s. 160.

Form of writs.]—The writs of execution in use on judgments in personal actions are the *fiery facias*, the *elegit*, and the *capias ad satisfaciendum*. Under the first, the goods of the judgment debtor are seized and sold to satisfy the debt; under the second, his chattels are levied and his lands extended; and under the last, his person is arrested. Besides these there is the writ of *levari facias*, affecting the debtor's land and chattels, which, however, has been entirely superseded by the writ of *elegit*. A new writ is given in cases of detinue, to enforce the return of the chattels without giving the defendant the option of retaining it upon paying the value assessed, by the 78th section of the C. L. P. Act, 1854. It is granted upon application to the court or a judge, and is additional to the ordinary execution against the goods of the defendant for the damages, costs, and interest in the action.⁽¹⁾ The writ must strictly pursue the judgment. It should agree with it in the name of the defendant, although he be described by a wrong name.⁽²⁾ If there are several defendants, it must be against all, or a valid reason shown on the face of it for the omission of any one.⁽³⁾ If execution be against the lands of a deceased defendant, his heir and terre tenants must be made parties to the record by *sci. fa.*⁽⁴⁾ If against a company under an act of Parliament, the execution must be against the property of persons made liable by the act.⁽⁵⁾ The writ should also agree with the judgment in its statement of the amount of the debt, or show why it does not.⁽⁶⁾ If there be a certificate for speedy execution as to part, it should recite the same, and direct a levy of such part only.⁽⁷⁾ The forms in use are contained in the schedule to the Reg. Gen. H. T., 1853, but any variance therefrom, not being in matter of substance, does not affect their validity or regularity. Writs of execution on a judgment on issues of fact tried by a judge without a jury are the same as in ordinary cases.⁽⁸⁾

Proceedings before issuing.—It is not necessary upon

(1) See *post*, "Execution in detinue."

(2) *Reeves v. Slater*, 7 B. & C. 486; *Fisher v. Magnay*, 1 D. & L. 405.

(3) *Raynes v. Jones*, 9 M. & W. 104.

(4) Tidd's Pr. 1174, 8th edit.

(5) *Pritchard v. The London and Birmingham Extension Railway Company*, 15 C. B. 331.

(6) *Webber v. Hutchins*, 8 M. & W. 319; *Arnell v. Weatherly*, 1 C. M. & R. 831.

(7) *Smith v. Dickenson*, 1 D. & L. 155.

(8) Reg. Gen. M. V. 1854, sched. 8.

issuing executions upon any judgment whatever to enter the proceedings upon any roll ;⁽¹⁾ but no writ of execution can be issued till the judgment paper, *postea*, or inquisition, as the case may be, has been seen by the proper officer, nor can any writ of execution be issued without a *præcipe* being filed with the proper officer.⁽²⁾ The different sorts of writs of execution are directed, tested, and indorsed in the same manner.

2. *Of the Direction of Writs of Execution.*

No writ need issue into county in which venue laid.]—By the C. L. P. Act, 1852, s. 121, it is provided that “it shall not be necessary to issue any writ directed to the sheriff of the county in which the venue is laid, but writs of execution may issue at once into any county, and be directed to, and executed by, the sheriff of any county, whether a county palatine or not, without reference to the county in which the venue is laid, and without any suggestion of the issuing of a prior writ into such county.

Counties palatine.]—By the 122nd section of the C. L. P. Act, 1852, all writs of every description issuing out of the Courts of Common Law at Westminster to be executed in the counties palatine, shall be directed and delivered to the sheriff of such counties, and executed and returned by them to the courts out of which such writs are issued, in the same manner in all respects as writs are executed and returned by the sheriffs of other counties.”

Where part of county detached.]—Where a part of a county is locally within another county it is, by the 2 Will. 4, c. 39, s. 20, to be deemed to be part, as well of the county wherein such district or place is so situate, as of the county whereof the same is parcel, and any writ or process may be directed accordingly and executed in either of such counties. By the 7 & 8 Vict. c. 61, s. 1, such detached portions of counties are to be considered for all purposes as forming part of the county of which it is considered a part, for the purpose of electing members to serve in Parliament as knight of the shire, under the 2 & 3 Will. 4, c. 64; but by the 4th section no judicial proceeding, &c., shall be invalidated by reason of any error in stating the name of the county to which such detached portion originally belonged instead of the county to which it now belongs under that act.

(1) Reg. Gen. H. T. 1853 (Pr.) r. 70.

(2) *Ibid.* r. 71.

Liberty.—If the writ is to be executed within a liberty or franchise, it must be directed to the sheriff of the county in which the same is situate.⁽¹⁾

Cinque ports.]—In the cinque ports all writs issued after the 30th of September, 1855, are directed and executed in the same manner as in other places;⁽²⁾ those issued prior to that date must be directed to the Constable of Dover Castle.⁽³⁾

Berwick-upon-Tweed.]—In Berwick-upon-Tweed the writ is directed to the Mayor and Bailiffs of Berwick-upon-Tweed.⁽⁴⁾

To whom to be directed.]—If a writ which should be directed to the sheriff be directed to any other person it is void. If there are two sheriffs and one of them is a party, the writ should be directed to the other.⁽⁵⁾ If there be but one, and he is a party, then to the coroners. If there be no coroners, or, being coroners, they also are parties, then to persons appointed by the court, usually called elisors.⁽⁶⁾ A writ directed to a sheriff who is a party will be set aside for irregularity.⁽⁷⁾ A writ directed to the “sheriff” instead of “sheriffs” of London,⁽⁸⁾ or to the “sheriffs” instead of the “sheriff” of Middlesex⁽⁹⁾ is bad. A writ cannot be directed in the alternative to A. or B.⁽¹⁰⁾

3. *Teste and Return Day of Writs.*

Teste of writ.]—As to the teste of the writ, by Reg. Gen. H. T. 1853 (Pr.), r. 72, “every writ of execution shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chief Justice, or of the Lord Chief Baron of the court from which the same shall issue, or, in case of a vacancy of such officer, then in the name of the senior puisne judge of the said court.” This rule

(1) *Bowling v. Pritchard*, 14 East, 288.

(2) 18 & 19 Vict. c. 48, s. 3.

(3) *Ibid.* s. 2; *Frank v. James*, 5 Dowl. 723.

(4) *Mayor of Berwick-upon-Tweed v. Shanks*, 11 Moo. 372.

(5) *Letson v. Bickley*, 6 M. & S. 144.

(6) *Mayor of Norwich v. Gill*, 1 Dowl. 246.

(7) *Weston v. Coulson*, 1 W. Bl. 508.

(8) *Nicol v. Boyne*, 2 Dowl. 761; *Barker v. Weedon*, *ib.* 707.

(9) *Jackson v. Jackson*, 3 Dowl. 182.

(10) *R. v. Fowler*, 1 Lord Raym. 586.

is imperative: a writ cannot, therefore, now, as heretofore, when issued in term, bear teste as of the first day of term, or in vacation, as of the last day of the preceding term, but must bear the date of the day of issuing the same. Writs of execution to fix bail may be tested and returnable in vacation.⁽¹⁾

Return day of writ.]—As to the day upon which the writ of execution must be made returnable, previous to the 3 & 4 Will. 4, c. 67, s. 2, it was imperative to make the writ returnable on a day certain in term.⁽²⁾ By that act writs “may” be made “returnable immediately after the execution thereof;” and now, by Reg. Gen. H. T. 1853, r. 72, they “may” be made returnable on a day *certain* in term. It would therefore appear that the practice is now what it was before the late rule, i. e. that it is optional to make the writ returnable either on a day certain in term, or “immediately after the execution thereof;”⁽³⁾ and in the latter case it is in force until completely executed.⁽⁴⁾ A writ returnable on a Sunday, or a *dies non*, is a nullity.⁽⁵⁾

4. *The Indorsement of Writs of Execution.*

Indorsement of direction to levy.]—By Reg. Gen. H. T. 1853, (Pr.) r. 76, “every writ of execution shall be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable, and sought to be recovered under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of 4*l.* per cent. per annum, from the time when the judgment was entered up, or if it was entered up before the 1st of October, 1838, then from that day; provided that in case where there is an agreement between the parties that more than 4*l.* per cent. interest shall be secured by the judgment, then the indorsement may be accordingly to levy the amount of interest so agreed.” The indorsement should only direct a levy of the amount then actually due under the judgment, therefore if money has been paid on account of the judgment, the indorsement should be to levy only the balance.⁽⁶⁾ So in

⁽¹⁾ C. L. P. Act, 1854, s. 90.

⁽²⁾ *Furtado v. Miller*, Barnes, 213.

⁽³⁾ *Drake v. Gough*, 1 Dowl. N. S. 573.

⁽⁴⁾ *Jordan v. Binckes*, 13 Q. B. 757; *Lewis v. Holmes*, 10 Q. B. 896.

⁽⁵⁾ *Morrison v. Manley*, 1 Dowl. N. S. 773.

⁽⁶⁾ *Plevin v. Henshall*, 10 Bing. 24.

debt on a bond conditioned to pay a sum in gross, it should be indorsed to levy only the principal, interest, nominal damages, and costs.⁽¹⁾ By Reg. Gen. H. T. 1853 (Pr.), r. 77, "in case of an assessment of further damages, pursuant to the stat. of 8 & 9 Will. 3, c. 11, it shall be stated in the body of the writ of execution that the sheriff, or other officer to whom it is directed, is to levy interest on the damages assessed and costs taxed in that behalf, at the rate of 4l. per cent. per annum, from the day on which execution was awarded, unless execution was awarded before the 1st of October, 1838, and in that case from that day." If execution be fraudulently issued for the whole amount of a judgment debt after it has been partly satisfied, the proper course is to apply to the court to set aside the judgment or the execution; no action will lie to recover the amount.⁽²⁾ But if there be neither fraud nor injury, the court will not set aside the execution, though it be issued for too large a sum, but it will order the process to be amended.⁽³⁾ If too much be levied the court will compel the plaintiff to refund the overplus;⁽⁴⁾ and if by mistake too little has been levied the court will, on condition, allow the plaintiff to take out a *fi. fa.* for the residue;⁽⁵⁾ but this does not apply where execution has been by *ca. sa.*⁽⁶⁾

Indorsement of name, &c., of attorney.—It is further required by Rule 73, H. T. 1853, "that every writ of execution shall be indorsed with the name and place of abode, or office of business, of the attorney actually suing out the same, and in case such attorney shall not be an attorney of the court in which the same is sued out, then also with the name and place of abode, or office of business of the attorney of such court in whose name such writ shall be taken out; and when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ; and in case no attorney shall be employed to issue the writ, then it shall be indorsed with a memorandum expressing that the same has been sued out by the plaintiff or

(1) *Amery v. Smalridge*, 2 W. Bl. 760; see 1 Saund. 58 e.

(2) *De Medina v. Grove*, 10 Q. B. 152.

(3) *McKormack v. Melton*, 1 Ad. & E. 331.

(4) *Barehead v. Hall*, 8 Dowl. 796.

(5) *Hunt v. Pasmors*, 2 Dowl. 414.

(6) *Smith v. Dickinson*, 13 L. J. 151, Q. B.

defendant in person, as the case may be, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's or defendant's residence, if any such there be." (1) The following is the form of indorsement:—

Levy £ [the amount really due] and interest at 4l. per cent. [unless there have been an agreement for more interest than such interest] from the day of 18 [the day when judgment was entered up, if before 1st October, 1838, insert that date] besides sheriff's poundage fees and expenses of the execution.

The within writ was issued by E. F. of [here insert the place of abode or office of business of the attorney actually suing out the writ,] attorney for the within-named plaintiff. [In case the attorney actually suing out the writ is not an attorney of the court, add, "in the name of G. H. of" [place of abode, or office of business of the attorney in whose name the writ was taken out] "an attorney of the Court of Q. B. (or "C. P." or "Exch. of P." [If sued out by a town agent on a country attorney, add, "on behalf of J. K. of [place of abode of the attorney in the country] attorney for the within-named plaintiff.

If the writ be issued by the party himself the indorsement will be—

The within writ was issued by A. B. of [the city, town, or parish, and also the name of the hamlet, street, and number of the house of the party's residence, if any such there be], the within-named plaintiff [or defendant] in person.

II. OF THE RENEWAL AND SUCCESSION OF WRITS—OF THEIR EXECUTION—OF THE POUNDAGE FEES AND EXPENSES OF EXECUTION—AND OF THE AMENDMENT AND SETTING ASIDE OF IRREGULAR WRITS.

1. Of the Renewal and Succession of Writs of Execution, and from what time they bind the Property of the Debtor.

Renewal of writ.—A writ of execution, if unexecuted, does not remain in force for more than one year from the teste of such writ unless renewed. The writ may, at any time before its expiration, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal, bearing the date of the day, month, and year of such renewal (which seal is kept at the office of the Masters of the court out of which the writ issued), or by the party giving a written notice of the renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the court. A writ of execution so renewed has effect and is entitled to priority according to

(1) See *Miller v. Bowden*, 1 C. & J. 563.
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the time of its original delivery.⁽¹⁾ Writs issued before the 24th October, 1852, if unexecuted, did not remain in force for more than six calendar months after the 24th October, 1854, unless they were renewed.⁽²⁾

Succession of writs.—The judgment creditor may have several writs running at the same time, either of a different species, into the same county, or of the same species into different counties,⁽³⁾ but only one should be executed.⁽⁴⁾ Writs at the same time in the sheriff's hands are entitled to priority according to the order in which they were lodged.⁽⁵⁾ The judgment creditor may abandon an unexecuted writ and sue out another.⁽⁶⁾ If part only be levied under a *fi. fa.* or *elegit*, he may, after the return of the first writ, sue out another for the residue, but he cannot do so until after its return, and the second writ should recite the first, and state the amount levied under it.⁽⁷⁾ If *nulla bona* be returned, to a *fi. fa.*, an *alias*, and after that a *pluries fi. fa.* may issue into the same county, or any other writ into the same county, or a *fi. fa.* or any other writ into any other county; if part be levied a new writ may issue for the residue. If no land be extended under an *elegit* another *elegit* may be issued into another county, or, if lands be extended, into the same county, upon a suggestion that defendant has other lands, and in such case no other writ than an *elegit* can be issued.⁽⁸⁾ If a *ca. sa.* be not executed the plaintiff may sue out any other writ, or an *alias ca. sa.* and after that a *pluries ca. sa.* to the same sheriff, or any other writ of execution into any other county; but if executed no other writ can in general issue, unless he die in execution, in which case execution may be sued out against his lands or goods.⁽⁹⁾

From what time writs bind property.—The lands of the

(1) C. L. P. Act, 1852, s. 124.

(2) *Ibid.* 1854, s. 94.

(3) *Dunn v. Harding*, 2 Dowl. 803; *Aldridge v. Rawden*, 22 L. T. 107.

(4) *Lewis v. Morris*, 2 C. & M. 712.

(5) *Theobald v. Cotterell*, 20 L. T. 212.

(6) *Lawes v. Codrington*, 1 Dowl. 30; *Miller v. Parnell*, 6 Taunt. 37.

(7) *Chapman v. Bowely*, 8 M. & W. 249; *Reg. v. The Sheriff of Essex*, 8 Dowl. 5; *Hodgkinson v. Whally*, 2 C. & J. 86.

(8) *Foster v. Jackson*, Hob. 57; *Cooper v. Langworth*, Moore, 254; Bro. Abr. "Elegit," 15.

(9) 21 Jac. 1, c. 24.

creditor are bound by the judgment, his goods and chattels by the writ of execution: but by 29 Car. 2, c. 3, s. 16, "no writ of *fi. fa.* or other writ of execution shall bind the property of the goods of the party against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, undersheriff, or coroners to be executed," who are directed to indorse upon the back of the writ the date upon which they received it. Notwithstanding this statute, save as to purchasers for a valuable consideration, the writ still binds the party's goods from the time of the teste;⁽¹⁾ and the sheriff may take the goods, although the defendant has assigned them, after delivery of the writ, for a valuable consideration, provided the sale were not in market overt.⁽²⁾ But the property in the goods is not altered by the writ until execution and sale.⁽³⁾ The court will inquire into the fraction of a day to ascertain whether the conveyance by the defendant or the delivery of the writ to the sheriff had priority in point of time,⁽⁴⁾ save in cases where the Crown makes a claim.⁽⁵⁾ Notice to the sheriff not to proceed until further order operates as a suspension of the writ.⁽⁶⁾

2. *Of the Sheriff's Warrant to execute, and where, when, and how Writs must be executed.*

Sheriff's warrant to execute.—To enable any other than the sheriff or person to whom the writ is directed to execute it there must be a warrant from him, that is, an order in writing to his officer to execute the writ.⁽⁷⁾ The warrant may be directed either to the sheriff's ordinary bailiff or to a special bailiff nominated by the plaintiff or his attorney.⁽⁸⁾ A sheriff's bailiff cannot make a deputy,⁽⁹⁾ and he should not be an infant.⁽¹⁰⁾ The validity of the execution will not, it appears, be affected by a variance between the writ and warrant.⁽¹¹⁾ The warrant need not specify the court out of

(1) 1 Saund. 219 f.

(2) *Samuel v. Duke*, 6 Dowl. 536; *Payne v. Drew*, 4 East, 523.

(3) *Lucas v. Nockells*, 10 Bing. 157.

(4) *Bowen v. Bramidge*, 6 C. & P. 140.

(5) *Reg. v. Edwards*, 23 L. J. 165, Exch.

(6) *Hunt v. Hooper*, 12 M. & W. 664.

(7) *Hamon v. Lord Jermyn*, 1 Lord Raym. 190.

(8) *Porter v. Viner*, 1 Chit. R. 613.

(9) *Jackson v. Hill*, 10 Ad. & E. 484.

(10) *Cuckson v. Waite*, 2 M. & R. 313.

(11) *Rose v. Tomblinson*, 3 Dowl. 49; *Williams v. Lewis*, 1 Chit. R. 611.

which the writ issued.⁽¹⁾ If the warrant be altered or filled up, in its direction or otherwise, after it is issued, it is void.⁽²⁾ If the sheriff make out the warrant before he has the writ in his possession he is liable to a penalty of 10*l.*,⁽³⁾ and an arrest before the delivery of the writ to the sheriff is illegal.⁽⁴⁾ The officer to whom the warrant is directed should execute the writ; if directed to two or more jointly and severally, any one of them may, but, if jointly only, all of them must, execute the writ.⁽⁵⁾ It is not necessary, however, that he or they should actually execute it, but they must be acting in the execution.⁽⁶⁾

Time at which writ must be executed.]—With respect to the time at which a writ must be executed, the sheriff must execute the writ within a reasonable time after he receives it, and if he neglect to do so the party suing out the writ may maintain an action against him if he sustain damage.⁽⁷⁾ He cannot refuse to execute the writ if there be an opportunity of executing the same, and he is required to do so.⁽⁸⁾ The writ, however, may be executed at any time before it is returnable, and if returnable immediately after the execution thereof, it may be executed at any distance of time.⁽⁹⁾ If returnable on a particular day it may be executed at any time of such day.⁽¹⁰⁾ If the defendant die after execution is sued out, the writ may be executed on his goods in the hands of his executor.⁽¹¹⁾ If the plaintiff should die, the writ will be executed, and his executor shall have the money,⁽¹²⁾ or it will be paid into court if there be no personal representative. If, after execution sued out, the defendant be discharged from the debt under the Bankrupt or Insolvent Acts, or be protected from the writ, it cannot be

(1) *Astley v. Goodjer*, 2 Dowl. 619.

(2) *Pearson v. Yewens*, 5 Bing. N. C. 489; *Jackson v. Hill*, 10 Ad. & G. 477.

(3) 6 Geo. 1, c. 21, s. 53.

(4) *Hall v. Roche*, 8 T. R. 187.

(5) *Boyd v. Durand*, 2 Taunt. 161.

(6) *Bletch v. Archer*, Cowp. 65.

(7) *Randell v. Wheble*, 10 Ad. & E. 719; *Jacobs v. Humphrey*, 2 C. & M. 13; *Aireton v. Davis*, 9 Bing. 740.

(8) *Mason v. Paynter*, 1 Q. B. 974.

(9) *Greenshields v. Harris*, 9 M. & W. 774.

(10) *Maud v. Barnard*, 2 Burr. 812.

(11) *Wither v. Harris*, 2 Lord Raym. 808; *Dunsford v. Gouldsmith*, 8 Moo. 145.

(12) *Clerk v. Withers*, 2 Lord Raym. 1073.

executed, nor can the sheriff execute the writ after it has been countermanded.⁽¹⁾

Where writ must be executed.]—The writ must be executed within the county or other place to the sheriff of which it is directed, otherwise the execution will be irregular.⁽²⁾ It cannot be executed in the Queen's presence, nor within the verge of her royal palace, unless by the leave of the Board of Green Cloth,⁽³⁾ nor in the Queen's Courts of Justice whilst the Queen's justices are there sitting,⁽⁴⁾ nor in the Tower.⁽⁵⁾

How writ must be executed.]—The sheriff may enter the defendant's house to execute the writ, and though neither the defendant nor his goods be there, he is justified if he had reasonable ground to suspect that he or they were there.⁽⁶⁾ He may enter the house of a third person if the defendant or his goods are there, otherwise not;⁽⁷⁾ but he must not, unless with the licence of the defendant or occupier, remain a longer time than is reasonably necessary for the purpose of executing the writ.⁽⁸⁾ In effecting an entrance the sheriff may enter when the outer door is open, or through any other opening; but he cannot break open an outer door or window,⁽⁹⁾ unless in the case of a writ of seisin, or *habere facias possessionem*, when he may break open the door if denied entrance by the tenant,⁽¹⁰⁾ and except also in cases where the execution is at suit of the Queen.⁽¹¹⁾ But having got peaceable entrance he may break open any inner door, cupboards, trunks, &c., if necessary.⁽¹²⁾ And goods it appears may be taken through the windows of a house, if open.⁽¹³⁾ The above rule does not extend to a barn or outhouse not connected with or within the same

⁽¹⁾ *Barker v. St. Quintin*, 1 Dowl. & L. 542.

⁽²⁾ *Greenshield v. Pritchard*, 8 M. & W. 148.

⁽³⁾ *R. v. Stobbs*, 3 T. R. 735.

⁽⁴⁾ 3 Blackst. Com. 289.

⁽⁵⁾ *Batson v. M'Lean*, 2 Chit. R. 51.

⁽⁶⁾ *Semayne's case*, 5 Co. R. 92.

⁽⁷⁾ *Morriah v. Murray*, 13 M. & W. 52; *Johnson v. Leigh*, 6 Taunt. 245; *Hutchinson v. Birch*, 4 Taunt. 619.

⁽⁸⁾ *Doe v. Trye*, 5 Bing. N. C. 573.

⁽⁹⁾ *Semayne v. Gresham*, Moore, 668.

⁽¹⁰⁾ *Semayne's case*, 5 Co. R. 91.

⁽¹¹⁾ *Lannock v. Brown*, 2 B. & A. 592; *Sir Thomas Kemp and Windsor's case*, 4 Leon. 41.

⁽¹²⁾ *Hutchinson v. Birch*, 4 Taunt. 619.

⁽¹³⁾ 1 Roll. Abr. 671, pl. 7.

curtilage with the dwelling-house, the outer door of which may be broken open without any previous demand or refusal of admission,⁽¹⁾ and a prior illegal entry to execute a *fi. fa.* does not vitiate a subsequent legal entry, if the first were abandoned.⁽²⁾ Likewise, if the defendant, after arrest on a *capias*, escape into his own or another house, the outer door may be broken open to retake him on fresh pursuit, and after a demand of admission;⁽³⁾ or if, upon pursuit, he has taken refuge in the dwelling-house of a third person, or if his goods have been brought there to prevent the execution, the sheriff may, on demand and refusal, break open the outer door of such dwelling-house.⁽⁴⁾ The sheriff or his officer may justify breaking open the outer door in order to get out where he has been locked in;⁽⁵⁾ or if forcibly expelled after a lawful entry, he may break open the door to gain admission,⁽⁶⁾ or to carry away goods where he has no other means of effecting his object.⁽⁷⁾ A sworn and known officer need not, but a special bailiff must, if demanded, show his warrant.⁽⁸⁾

3. *Of the execution of the Writ of Fieri Facias.*

Seizure and sale.—The officer in execution of the writ having seized the goods leaves an assistant in possession until an inventory of them be made, when he removes them, or, if the person in whose premises they are consents, sells them there.⁽⁹⁾ The sale must be made within a reasonable time,⁽¹⁰⁾ but it need not be by auction,⁽¹¹⁾ and although the goods cannot be delivered to the execution creditor in satisfaction of his debt⁽¹²⁾ they may be sold to him for their real value.⁽¹³⁾ The sale conveys an indefeasible title, unless the writ were void or the goods the property of a stranger.⁽¹⁴⁾

(1) *Penton v. Brown*, 1 Sid. 181.

(2) *Percival v. Stamp*, 9 Exch. 167.

(3) *Lloyd v. Sandilands*, 8 Taunt. 250.

(4) *Semayne's case*, 5 Co. 93 a; *Genner v. Sparks*, 1 Salk. 79.

(5) *White v. Wiltshire*, Palm. 52.

(6) *Aga Kurboolie Mahomed v. The Queen*, 4 Moore, 239.

(7) *Pugh v. Griffiths*, 7 A. & E. 838.

(8) *Mackally's case*, 9 Rep. 69; but see *Hall v. Roche*, 8 T. R. 188.

(9) *Aikenhead v. Blades*, 5 Taunt. 198.

(10) *Atreton v. Davis*, 9 Bing. 740.

(11) *Keighley v. Birch*, 3 Camp. 521.

(12) *Thompson v. Clark*, Cro. Eliz. 504.

(13) *Hannaman v. Bowker*, 25 L. J. 69, Exch.; *Leader v. Danvers*, 1 B. & P. 360.

(14) *Doe v. Thorn*, 1 M. & S. 425; *Farrant v. Thompson*, 2 D. & R. 1.

If, however, the defendant should pay the debt and costs to the sheriff or officer, it is a discharge of the execution: ⁽¹⁾ and the sheriff may take a bond conditioned to pay the money into court at the return of the *fi. fa.* ⁽²⁾ The sheriff may withdraw without sale on the order of the plaintiff's attorney. ⁽³⁾

Payment of arrears of rent.]—Goods seized on demised premises cannot be removed unless the landlord be satisfied his arrears of rent, not exceeding one year's rent; ⁽⁴⁾ but if the premises be let at a weekly rent, the landlord can claim only for four weeks' arrears; and if for any other term less than a year, then for four such terms or times of payment. ⁽⁵⁾ The statute of Anne contemplates a tenancy subsisting at the time of the execution and at a rent certain. ⁽⁶⁾ It extends only to the immediate landlord, therefore a ground landlord has no claim for his rent under an execution against the under lessee, ⁽⁷⁾ but it includes the case of lessee and under-tenant, ⁽⁸⁾ and of the executor and administrator of a deceased landlord for rent due in his lifetime, ⁽⁹⁾ and of forehand rent due at the time of the seizure: ⁽¹⁰⁾ and it applies where goods of a third person not liable to seizure are taken, ⁽¹¹⁾ and although the seizure be of growing crops the rent must be paid. ⁽¹²⁾ The landlord's claim must be confined to arrears due at the time of the seizure. ⁽¹³⁾ He is not obliged to pay poundage on the amount of rent levied for him. ⁽¹⁴⁾ If the goods are not sufficient to satisfy the arrears of rent, the sheriff should withdraw without selling, and he is safe in pursuing that course, ⁽¹⁵⁾ for rent need only

⁽¹⁾ *Swinstead v. Lydall*, 5 Mod. 296.

⁽²⁾ *Beaufage's case*, 5 Co. Rep. 99 b.

⁽³⁾ *Levi v. Abbot*, 4 Exch. 588.

⁽⁴⁾ 8 Anne, c. 14, s. 1; *Wollaston*, appellant, *Stafford*, respondent, 15 C. B. 278.

⁽⁵⁾ 7 & 8 Vict. c. 96, s. 67.

⁽⁶⁾ *Riseley v. Ryle*, 11 M. & W. 16.

⁽⁷⁾ *Bennet's case*, 2 Str. 787.

⁽⁸⁾ *Thurgood v. Richardson*, 7 Bing. 428.

⁽⁹⁾ *Palgrave v. Windham*, 1 Str. 212.

⁽¹⁰⁾ *Harrison v. Barry*, 7 Price, 690.

⁽¹¹⁾ *Forster v. Cookson*, 1 Q. B. 419.

⁽¹²⁾ *Allen v. Lloyd*, 2 Ir. Law Rep. (N. S.) 53.

⁽¹³⁾ *Hoskins v. Knight*, 1 M. & S. 245.

⁽¹⁴⁾ *Gore v. Goflon*, 1 Str. 643.

⁽¹⁵⁾ *Cocker v. Musgrove*, 9 Q. B. 223; *Foster v. Hilton*, 1 Dowl. 35; *Calvert v. Joliffe*, 2 B. & Ald. 418.

be paid where the goods are removed,⁽¹⁾ but until removal they are in *custodia legis*, and cannot be distrained on for rent.⁽²⁾ A bill of sale of the goods does not constitute a removal,⁽³⁾ but if the sheriff receive the proceeds under such bill of sale, he will be compelled, on motion, to pay over a year's rent to the landlord.⁽⁴⁾ The practice is for the sheriff to take enough to satisfy both the landlord and the execution creditor, and to make the payment to each of them.⁽⁵⁾

Taxes must be paid.]—The Queen's taxes due at the time of the seizure, to the extent of one year's arrears, must be paid by the sheriff to the collector before sale or removal.⁽⁶⁾

What property may be taken.]—As to the property which may be taken, the sheriff may seize all personal goods and chattels belonging to the defendant which can be sold,⁽⁷⁾ wearing apparel actually in use excepted;⁽⁸⁾ and any money or bank notes, cheques,⁽⁹⁾ bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the person against whose effects the *fi. fa.* is issued.⁽¹⁰⁾ Money seized and in the hands of the sheriff is in the same case as money the proceeds of goods seized.⁽¹¹⁾ The sheriff may also sell a lease or term of years,⁽¹²⁾ or an annuity for years,⁽¹³⁾ belonging to the defendant; but he cannot sell a mere equitable interest, such as an equity of redemption,⁽¹⁴⁾ nor things fixed to the freehold, and which go to the heir and not to the executor.⁽¹⁵⁾ But he may sell

(1) *White v. Binstead*, 13 C. B. 304.

(2) *Wharton v. Naylor*, 12 Q. B. 673.

(3) *Smallman v. Pollard*, 6 M. & G. 1001.

(4) *West v. Hedges*, Barnes, 211; *Henchett v. Kimpson*, 2 Wils. 140.

(5) *Wintle v. Freeman*, 11 A. & E. 548.

(6) 43 Geo. 3, c. 99, s. 37.

(7) *Legge v. Evans*, 6 M. & W. 36.

(8) *Sunbolf v. Alford*, 3 M. & W. 254.

(9) *Courtoy v. Vincent*, 15 Beav. 486; 21 L. J. 291, Ch.; S. C., *Watts v. Jeffreys*, 15 Jur. 435.

(10) 1 & 2 Vict. c. 110, s. 12. As to what money may be taken, see *Harrison v. Paynter*, 6 M. & W. 387; *Wood v. Wood*, 4 Q. B. 397; *Masters v. Stanley*, 8 Dowl. 169.

(11) *Collingridge v. Paxton*, 11 C. B. 683.

(12) *Taylor v. Cole*, 3 T. R. 294.

(13) *York v. Twyne*, Cro. Jac. 79.

(14) *Scott v. Scholey*, 8 East, 467.

(15) *Winn v. Ingilby*, 5 B. & A. 625.

utensils fixed by the defendant for the purposes of his trade;⁽¹⁾ and fixtures which may be removed by the tenant.⁽²⁾ He may seize corn, and other articles raised by the industry of man, which are emblements and go to the executor;⁽³⁾ but things which yield no annual profit, or are produced without labour, are not emblements, they go to the heir, and cannot be taken. Where the lands are let to farm, the sheriff is prohibited by the 56 Geo. 3, c. 50, ss. 1, 2, from seizing any straw, chaff, colder, turnips, manure, compost, ashes, or seaweed, in any case whatsoever; and any hay, grass, or grasses, whether natural or artificial, tares, vetches, roots, or vegetables being produce of such lands, where there is any covenant or agreement not to take the same off the lands, and of which the sheriff has notice.⁽⁴⁾ [See subsequent sections of the above act for the mode in which the sale of such farm produce must be made.]

Whose property may be taken.—If the sheriff have any doubt whether any goods are the property of the defendant or a third party, he may impanel a jury to inquire in whom the property is vested:⁽⁵⁾ after seizure he may have recourse to an interpleader issue. If he seize the goods of a stranger he is liable to an action.⁽⁶⁾ Where the execution is against a husband, a term vested in him in right of his wife may be sold;⁽⁷⁾ but not goods vested in trustees before marriage for her benefit although in his possession:⁽⁸⁾ goods purchased by the wife out of money paid to her by trustees under a settlement to her separate use, may be seized, unless they were bought by her as agent of the trustees.⁽⁹⁾ The goods of a woman cohabiting with the defendant cannot be taken, although she passes for his wife.⁽¹⁰⁾ The goods of a testator or intestate cannot in general be taken in execution for the personal debt of the executor or administrator, unless he has converted the goods.⁽¹¹⁾ Where the *fi. fa.* is against one of the two partners the sheriff may seize the

(1) *Farrant v. Thompson*, 5 B. & A. 826.

(2) *Storer v. Hunter*, 3 B. & C. 368.

(3) *Allen v. Lloyd*, 2 Ir. Law R. (N. S.) 53.

(4) *Wilmot v. Rose*, 23 L. T. 76 Q. B.

(5) *Farr v. Newman*, 4 T. R. 638.

(6) *Sanderson v. Baker*, 2 W. Bl. 832.

(7) *Farr v. Newman*, 4 T. R. 638.

(8) *Heslington v. Gill*, 3 T. R. 620 n.

(9) *Carne v. Brice*, 7 M. & W. 183.

(10) *Glaspoole v. Young*, 9 B. & C. 696.

(11) *Quick v. Staines*, 1 B. & P. 293.

goods of both, and sell the defendant's undivided moiety in them; in which case the seizure does not divest the other party of his property in the goods, but the vendee will, it is said, be tenant in common with him.⁽¹⁾

Goods pawned, or let.]—Goods pawned or gaged for a debt with the defendant, and goods demised or let to him, may be seized, but cannot be sold absolutely.⁽²⁾ Goods of the defendant pawned and leased to another may be sold, subject to the right of the pawnee or lessee, but not seized before the end of the bailment or term.⁽³⁾ Goods held by a party in right of a lien cannot be taken in execution against him.⁽⁴⁾ Goods in the hands of a receiver, appointed in a suit in the Court of Chancery, cannot be taken in execution.⁽⁵⁾

Goods fraudulently assigned.]—If the defendant sell his goods after delivery of the writ to be executed, the sale is void as against the execution creditor, unless made in market overt.⁽⁶⁾ And an assignment, though before the delivery of the writ to the sheriff, if made fraudulently to delay, hinder, or defraud creditors is void as against them.⁽⁷⁾ Where the writ under which goods are seized is founded on a judgment fraudulent against creditors, the sheriff is bound to sell them under a subsequent writ founded on a *bonâ fide* debt;⁽⁸⁾ and to reseize them if he has assigned them under the prior execution.⁽⁹⁾

Goods privileged.]—The goods of ambassadors and other public ministers of foreign states at this Court are privileged;⁽¹⁰⁾ and so are the goods ecclesiastical of clergymen.⁽¹¹⁾ Goods distrained cannot be seized in execution.⁽¹²⁾

(1) *Johnson v. Evans*, 7 Scott N. R. 1035; S. C., 1 D. & L. 935; *Heydon v. Heydon*, 1 Salk. 392; *Burton v. Green*, 3 C. & P. 306; *Holmes v. Mentz*, 4 A. & E. 127.

(2) *Dean v. Whittaker*, 1 C. & P. 347; *Rogers v. Kennay*, 9 Q. B. 592.

(3) *Scott v. Scholey*, 8 East, 476.

(4) *Legg v. Evans*, 6 M. & W. 36.

(5) *Russell v. East Anglian Railway Company*, 20 L. J. 257, Ch.; S. C., 3 Macn. & G. 104.

(6) *Samuel v. Duke*, 6 Dowl. 536.

(7) 13 Eliz. c. 5; *Christopherson v. Burton*, 3 Exch. 160; *Gale v. Williamson*, 8 M. & W. 405.

(8) *Imray v. Magnay*, 11 M. & W. 267.

(9) *Christopherson v. Burton*, 3 Exch. 160.

(10) 7 Anne, c. 12, s. 3.

(11) *Walwyn v. Auberry*, 2 Mod. 257.

(12) *Reddell v. Stowey*, 2 M. & Rob. 358.

Goods of bankrupts.]—Before the 12 & 13 Vict. c. 106, all executions after an act of bankruptcy committed by the debtor, followed by a commission or fiat, were void;⁽¹⁾ but such executions are now rendered valid by the 133rd section of that act, if *bonâ fide* executed by seizure, if against the land and tenements of the bankrupt, and by seizure and sale if against his goods and chattels,⁽²⁾ before the date of the fiat, or the filing of the petition,⁽³⁾ provided the person at whose suit, or on whose account the execution has issued, had not at the time of so executing or levying such execution, or at the time of making any sale thereunder, notice of any prior act of bankruptcy by him committed. Notice to the accredited agent of a body corporate or public company is notice to the body corporate or company.⁽⁴⁾ Notice to an agent or to the attorney in the cause is sufficient;⁽⁵⁾ but not to the attorney's clerk,⁽⁶⁾ unless he have the management of the cause.⁽⁷⁾ Notice to the sheriff's officer in possession is not enough.⁽⁸⁾ The knowledge of one of two partners is *prima facie* the knowledge of both.⁽⁹⁾

Priority of writs.]—If two writs of *fi. fa.* are delivered to the sheriff against the same person, he must execute that first which was first delivered, though both were delivered on the same day.⁽¹⁰⁾ If on the delivery of the second he has seized goods under the first writ, he may be said immediately upon the delivery of such second writ to have seized goods under it also;⁽¹¹⁾ so that if the first be fraudulent, set aside, withdrawn or suspended, the second has priority.⁽¹²⁾

(1) *Garland v. Helyar*, 4 Bing. N. C. 7.

(2) *Whitmore v. Green*, 13 M. & W. 104; *Hutton v. Cooper*, 2 L. M. & P. 104; *Standish v. Ross*, 3 Exch. 527; *Smallcombe v. Oliver*, 13 M. & W. 77; *Belcher v. Magnay*, 12 M. & W. 102.

(3) *Ward v. Dalton*, 7 C. B. 643; *Freeman v. Whitaker*, 19 L. J. 351, Exch.; *Ramsey v. Eaton*, 10 M. & W. 22.

(4) 12 & 13 Vict. c. 106, s. 87.

(5) *Rothwell v. Timbrell*, 1 Dowl. N. S. 778.

(6) *Pennell v. Stevens*, 6 Dowl. & L. 157.

(7) *Pike v. Stevens*, 12 Q. B. 465.

(8) *Ramsey v. Eaton*, 10 M. & W. 22.

(9) *Edwards v. Cooper*, 11 Q. B. 33. As to what notice is sufficient, see *Udale v. Walton*, 14 M. & W. 254; *Follett v. Hoppe*, 5 C. B. 226; *Green v. Laurie*, 1 Exch. 335; *Conway v. Wall*, 1 C. B. 643; *Lackington v. Elliott*, 7 M. & G. 538; *Hocking v. Acraman*, 12 M. & W. 170.

(10) *Hutchinson v. Johnson*, 1 T. R. 729.

(11) *Chambers v. Colman*, 9 Dowl. 588.

(12) *Hunt v. Hooper*, 12 M. & W. 664; *Burr v. Freethy*, 1 Bing. 71; *Loxick v. Crowder*, 8 B. & C. 132.

Return.]—The sheriff returns *fieri feci* generally, or *fieri feci* as to part, specifying their value, and *nulla bona* as to the residue.⁽¹⁾ If there are no goods applicable to the writ,⁽²⁾ or if there has been no seizure, or the proceeds of a seizure have been exhausted in payment of rent, or satisfaction of a prior writ, he returns *nulla bona*.⁽³⁾ Or he returns that the goods, specifying their value, remain in his hands for want of buyers,⁽⁴⁾ or that error has been brought.⁽⁵⁾ A return that the sheriff seized the goods and kept possession until he received from the attorney of the plaintiff an order to withdraw from possession is good.⁽⁶⁾

Venditioni exponas.]—Where the return is that the goods remain in the sheriff's hands for want of buyers, a writ of *venditioni exponas* must be sued out to compel a sale of the goods.⁽⁷⁾ If the seizure has been of goods to the amount of part only of the debt, there may be a *venditioni exponas* as to such part, and a *fi. fa.* for the residue in one writ. The sheriff is bound, after the delivery of the *venditioni exponas*, to sell the goods;⁽⁸⁾ but not at the value set upon them in his return to the *fi. fa.*;⁽⁹⁾ and he cannot apply the proceeds in satisfaction of another writ.⁽¹⁰⁾

Form of venditioni exponas.]—The following is the form of a *venditioni exponas*.

VICTORIA, by the grace of God, of the United Kingdom of Great Britian and Ireland, Queen, Defender of the Faith. To the sheriff of _____, greeting. Whereas, by our writ we lately commanded you that, [if sued out of the Court of Exchequer, "you should omit not by reason of any liberty of your county, but that you should enter the same," &c.] of the goods and chattels of C. D. in your bailiwick, you should cause to be made £ _____, which A. B., lately in our Court of _____, re-

(1) *Willett v. Sparrow*, 6 Taunt. 576.

(2) *Shattock v. Carden*, 6 Exch. 725.

(3) *Cocker v. Musgrove*, 9 Q. B. 223; *Wintle v. Freeman*, 11 A. & E. 539.

(4) *Chambers v. Coleman*, 9 Dowl. 588.

(5) *Cleghorn v. Desanges*, 3 Mod. 83.

(6) *Levi v. Abbott*, 4 Exch. 588.

(7) *Cameron v. Reynold*, Cowp. 406.

(8) *Keightley v. Birch*, 3 Camp. 521; *Leader v. Danvers*, 1 B. & P. 359.

(9) *Charter v. Peters*, Cro. Eliz. 598.

(10) *Hughes v. Rees*, 4 M. & W. 468; *Dod v. Colman*, 9 Dowl. 916.

covered against him, whereof the said C. D. was convicted, together with interest at the rate of 4*l*. per centum per annum from the day of , A.D. , on which day the judgment aforesaid was entered up, and should have that money with such interest as aforesaid before us [*or*, "before our justices," *or*, "before the barons of our Exchequer"] at Westminster, immediately after the execution thereof to be rendered to the said A. B., and that you should do all such things as by the statute passed in the second year of our reign you were authorized and required to do in that behalf, [*as in the writ of fl. fa.*] And you at a day now past returned to us [*or in the C. P.*, "to our justices," *or in the Exchequer*, "to the barons of our Exchequer"] at Westminster, that by virtue of the said writ to you directed, you had taken goods and chattels of the said C. D. to the value of the money and interest therein mentioned, which goods and chattels remained in your hands for want of buyers, and that therefore you could not have that money and interest before us [*or in the C. P.*, "before our said justices," *or in the Exchequer*, "before our said barons,"] at the day and place therein contained as you were thereby commanded. Therefore, we being desirous that the said A. B. should be satisfied the said money and interest aforesaid, command you that you expose to sale and sell, or cause to be sold, the said goods and chattels of the said C. D., so by you taken as aforesaid, for the best price you can get for the same, and at least for the said money and interest, and have the money so arising from such sale before us [*or in the C. P.*, "before our justices," *or in the Exchequer*, "before the barons of our Exchequer"] at Westminster, immediately after the execution hereof to be rendered to the said A. B., and have you there then this writ.

Witness, &c.

Distringas nuper vicecomitem.]—Where, after the sheriff has returned that the goods remain in his hands for want of buyers, he goes out of office, the plaintiff may sue out a *distringas nuper vicecomitem*, directed to the present sheriff, commanding him to distrain the late sheriff to sell the goods,⁽¹⁾ and unless he do so he will forfeit issues to the amount of the debt; and if further costs have been incurred by reason of the delay, the court will, upon motion, increase issues to meet such costs.⁽²⁾

Remedy for amount of levy.]—If the sheriff do not pay over the amount of the levy to the execution creditor, the latter may, in case a return of *fieri feci* has been made,

⁽¹⁾ *Clerk v. Withers*, 6 Mod. 290.

⁽²⁾ *Phillips v. Morgan*, 4 B. & A. 652; *Nowell v. Underwood*, 5 Dowl. 229.

proceed against him for the amount by rule of court,⁽¹⁾ or by action;⁽²⁾ and in case no return has been made, he may maintain an action against the sheriff or his executors for the money levied,⁽³⁾ though the money has not been demanded,⁽⁴⁾ but the sheriff's poundage will be deducted.⁽⁵⁾

Forms of writs of fieri facias.—The following forms of *fi. fa.* are given by the schedule annexed to Reg. Gen. H. T. 16 Vict. They are to be used with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the nature of the case, may render necessary; but any variance therefrom, not being in matter of substance, does not affect their validity or regularity.⁽⁶⁾

No. 1. Writ of Fieri Facias on a Judgment for Plaintiff.

VICTORIA, by the grace of God of the United Kingdom of Great Britian and Ireland, Queen, Defender of the Faith; to the sheriff of greeting. We command you, that [*if sued out of the Exchequer say, "we command you that you omit not by reason of any liberty of your county, but that you enter the same, and"*] of the goods and chattels of C. D. in your bailiwick you cause to be made £ [*the amount of all the money recovered by the judgment*] which A. B. lately in our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] recovered against him, whereof the said C. D. is convicted, together with interest on the said sum at the rate of four pounds per centum per annum from the day of in the year of our Lord (7) on which day the judgment aforesaid was entered up, and have that money with such interest as aforesaid before us [*or in the C. P., "before our justices," or in the Exchequer, "before the barons of our Exchequer," as the case may be*] at Westminster, immediately after the execution hereof, to be rendered to the said A. B.; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you shall have executed this our writ make appear to us [*or in the C. P., "to our*

(1) *Wood v. Wood*, 5 Jur. 525; see *Stockdale v. Hansard*, 1 A. & E. 253.

(2) *Dale v. Birch*, 3 Camp. 347.

(3) *Perkinson v. Gilford*, Cro. Car. 539; *Cockram v. Wellbye*, 2 Show. 79.

(4) *Dale v. Birch*, 3 Camp. 347.

(5) *Longdill v. Jones*, 1 Stark. 345.

(6) Reg. Gen. H. T. 16 Vict. "Forms of Proceedings."

(7) The day on which the judgment was entered up, or if entered up prior to the 1st of October, 1838, say, "from the 1st day of October, in the year of our Lord 1838," omitting the words, "on which day the judgment aforesaid was entered up."

justices," or in the Exchequer, "to the barons of our Exchequer," as the case may be] at Westminster, immediately after the execution hereof, and have you there then this writ.

Witness, at Westminster, the day of ,
in the year of our Lord .

No. 2. Writ of Fieri Facias on a Judgment for Debt.

[The same as No. 1 down to "liberty of your county, but that you enter the same, and," then continue as follows] cause to be made of the goods and chattels in your bailiwick of A. B., £ , which lately in our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be] were awarded to C. D., for his costs of defence in an action lately prosecuted in our said court by the said A. B. against the said C. D., whereof the said A. B. is convicted; together with interest on the said sum at the rate of four pounds per centum per annum, from the day of in the year of our Lord (1), on which day the judgment aforesaid was entered up, and have you that money before us [or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer," as the case may be] at Westminster, immediately after the execution hereof, to be rendered to the said C. D., and that you do all such things as by the statute, &c. [The same as in No. 1 to the end.]

No. 3. Writ of Fieri Facias on a Rule for Payment of Money.

[The same as in No. 1 down to "liberty of your county, but that you enter the same, and," then continue as follows] of the goods and chattels of C. D., in your bailiwick, for cause to be made, £ , which lately in our Court of Queen's Bench [or "Common Pleas," or "Exchequer of Pleas," as the case may be] by a rule of our said court, dated the day of A.D. , were ordered to be paid by the said C. D. to A. B., and that of the said goods and chattels of the said C. D. in your bailiwick, you further cause to be made interest upon the said sum, at the rate of four pounds per centum per annum, from the day of in the year of our Lord (2), on which day the said rule was made, and have that money, together with such interest as aforesaid, before us [or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer, as the case may be] at Westminster, immediately after the execution hereof, to be

(1) The day on which judgment was entered up, or if entered up prior to the 1st day of October, 1838, say, "from the 1st day of October, in the year of our Lord, 1838," omitting the words "on which day the judgment aforesaid was entered up."

(2) The day on which the rule was made, or if it were made prior to the 1st of October, 1838, say "from the 1st day of October, in the year of our Lord, 1838," omitting the words, "on which day the said rule was made."

rendered to the said A. B., and that you do all such things as by the statute, &c. [*The same as in No. 1 to the end.*]

No. 4. Writ of Fieri Facias on a Rule for Payment of Money and Costs.

[*The same as in No. 1 down to "liberty of your county, but that you enter the same, and," then continue as follows*] of the goods and chattels of C. D., in your bailiwick, you cause to be made £ , which lately in our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by a rule of our said court, dated the day of in the year of our Lord , were ordered to be paid by the said C. D. to A. B., together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said court, at £ ; and that of the said goods and chattels of the said C. D., in your bailiwick, you further cause to be made interest upon the said two several sums at the rate of four pounds per centum per annum, from the day of in the year of our Lord, ⁽¹⁾, and have those moneys, together with such interest as aforesaid, before us [*or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer," as the case may be*] at Westminster, immediately after the execution hereof, to be rendered to the said A. B. ; and that you do all such things as by the statute, &c. [*The same as in No. 1 to the end.*]

No. 5. Writ of Fieri Facias on a Rule for Payment of Costs only.

[*The same as No. 1 down to "liberty of your county, but that you enter the same, and," then continue as follows*] of the goods and chattels of C. D., in your bailiwick, you cause to be made £ , for certain costs which by a rule of our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] dated the day of , in the year of our Lord , were ordered to be paid by the said C. D. to A. B., which said costs have been taxed and allowed by our said court at the said sum, and that of the said goods and chattels of the said C. D., in your bailiwick, you further cause to be made interest upon the said sum, at the rate of four pounds per centum per annum, from the day of in the year of our Lord ⁽²⁾, and have that money, together with such interest as aforesaid, before us [*or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer," as the case may be*] at Westminster, immediately after the execution hereof, to be rendered to the said A. B. ; and that you do all such things as by the statute, &c. [*The same as in No. 1 to the end.*]

⁽¹⁾ The day on which the costs were taxed, if the costs were taxed after the rule made, and you seek to recover interest on the principal money from the date of the latter, you must alter the form accordingly.

⁽²⁾ The day on which the costs were taxed, or if there has been more than one allocatur, the day on which the last allocatur was made.

No. 6. Writ of Fieri Facias on a Judgment of an Inferior Court removed into one of the Superior Courts.

[*The same as in No. 1 down to "liberty of your county, but that you enter the same, and," then continue as follows*] of the goods and chattels of C. D., in your bailiwick, you cause to be made £ , which A. B., lately in [*insert the style of the court*] by the judgment of the said court, recovered against the said C. D., whereof the said C. D. is convicted, and which judgment was afterwards, on the day of in the year of our Lord , removed into our court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by virtue of an order of that our said court, or "of , one of the justices of that our said court," *as the case may be*] in pursuance of the statute in such case made and provided, and the costs attendant upon the application for the said order, and upon the said removal were on this day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] at £ ; and we further command you, that of the said goods and chattels of the said C. D., in your bailiwick, you further cause to be made the said £ ⁽¹⁾, together with interest on the said two several sums, at the rate of four pounds per centum per annum, from the said day of in the year of our Lord, ⁽²⁾, and that you have that money, with such interest as aforesaid, before us [*or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer," as the case may be*] at Westminster, immediately after the execution hereof, to be rendered to the said A. B., and that you do all such things as by the statute, &c. [*The same as in No. 1 to the end.*]

No. 7. Writ of Fieri Facias on a Rule or Order for Payment of Money made in an Inferior Court, and removed into one of the Superior Courts.

[*The same as in No. 1 down to "liberty of your county, but that you enter the same, and," then continue as follows*] of the goods and chattels of C. D., in your bailiwick, you cause to be made £ , which lately in [*insert the style of the court*] by a rule [*or "order"*] of the said court entitled [*as the case may be*], were by the said court ordered to be paid by the said C. D. to A. B.; and which rule [*or "order"*] was afterwards, on the day of in the year of our Lord , removed into our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by virtue of an order of that our said court, [*or "of , one of the justices of that our said court," as the case may be*] in pursuance of the statute in that case made and provided; and the costs and charges attendant upon

⁽¹⁾ The costs attendant upon the removal of the judgment out of the inferior court into the superior court.

⁽²⁾ The day on which the costs of removal were taxed.

the application for the said last-mentioned order, and upon the said removal were, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] at £ , and we further command you, that of the said goods and chattels of the said C. D., in your bailiwick, you further cause to be made the said £ ⁽¹⁾, together with interest on the said two several sums, at the rate of four pounds per centum per annum, from the said day of ⁽²⁾, and that you have those moneys, with such interest as aforesaid, before us [*or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer" as the case may be*] at Westminster, immediately after the execution hereof, to be rendered to the said A. B.; and that you do all such things as by the statute. [*The same as in No. 1 to the end.*]

No. 8. Writ of Fieri Facias on a Rule or Order for Payment of Money and Costs made in an Inferior Court, and removed into the Superior Courts.

[*The same as in No. 1 down to "liberty of your county, but that you enter the same, and," then continue as follows*] of the goods and chattels of C. D., in your bailiwick, you cause to be made £ , which lately in [*insert the style of the court*] by a rule [*or "order"*] of the said court, entitled [*as the case may be*], were by the said court ordered to be paid by the said C. D. to A. B., and also £ for the costs of the said rule [*or "order"*] by the said court also ordered to be paid by the said C. D., to the said A. B.; which said rule [*or "order"*] was afterwards, on the day of in the year of our Lord , removed into our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by an order of that our said court [*or "of one of the said justices of that our said court;" as the case may be*] in pursuance of the statute in such case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal were, on the day of , in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] at £ ; and we further command you, that of the said goods and chattels of the said C. D., in your bailiwick, you further cause to be made the said £ ⁽³⁾, together with the interest on the said three several sums, at the rate of four pounds per centum per annum from the said day of in the year of our Lord ⁽⁴⁾, and that you have those

(1) The costs of removing the rule of the inferior court into the superior court.

(2) The day on which the costs of removing the rule of the inferior court into the superior court were taxed.

(3) The costs of removing the rule from the inferior court into the superior court.

(4) The day on which the costs of removing the rule from the inferior court into the superior court were taxed.

moneys, with such interest as aforesaid, before us [or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer," as the case may be] at Westminster, immediately after the execution hereof, to be rendered to the said A. B.; and that you do all such things as by the statute, &c. [The same as in No. 1 to the end.]

4. Of the Execution of the Writ of Elegit.

Operation of writ.—The writ of *elegit* was first given by stat. Westm. 2,⁽¹⁾ by which the sheriff was empowered to deliver to the judgment creditor "all the chattels of the debtor, saving only his oxen and beasts of the plough, and a moiety of his land, until the debt be levied by a reasonable price or extent." By the Statute of Frauds⁽²⁾ the *elegit* is extended to estates held in trust for the creditor. Notwithstanding the 1 & 2 Vict. c. 110, s. 11, it is still necessary to keep the provisions of the prior acts in view, as there are still cases to which they alone apply. That enactment directs, as to *elegits* upon judgments recovered in the superior courts, that the sheriff shall deliver execution unto the plaintiff "of all such lands, tenements, rectories, tithes, rents, or hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been so seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of *elegit* is sued out," subject to such account in the court out of which the execution has been sued out as a tenant in *elegit* was then subject to in a court of equity, and to the render, where the lands are copyhold or customary, of such payments and services to the lord of the manor as the defendant would have been bound to render in case execution had not issued: and it entitles the plaintiff to hold the same copyhold or customary lands until the amount of such payments and the value of such services, as well as the amount of the judgment, shall have been levied. There are, however, three cases in which the

⁽¹⁾ 13 Edw. 1, c. 18. ⁽²⁾ 29 Car. 2, c. 3, s. 10.

elegit has no greater effect than it had before the passing of the Act of Victoria. 1st. As against mortgagees or creditors who were such before the 1st October, 1838.⁽¹⁾ 2ndly. Where the judgment is not registered.⁽²⁾ 3rdly. As against purchasers and mortgagees without notice, although the judgment be duly registered.⁽³⁾ The following distinctions may be noted between the operation of the *elegit* as before and as subsequently to the passing of the Act of Victoria. 1st. Previous to that act only a moiety of the debtor's lands could be extended,⁽⁴⁾ under the act the whole may be extended. 2ndly. Under the act the debtor's customary and copyhold lands may be extended, they could not before it.⁽⁵⁾ 3rdly. The execution debtor may extend lands over which his debtor has any disposing power, which he may, without the assent of any other person, exercise for his own benefit. This could not be done before the act.⁽⁶⁾ 4thly. Trust estates are bound from the time of entering the judgment, and not merely from the time of issuing the *elegit*, as was the case under the Statute of Frauds.⁽⁷⁾

What lands, &c., may be extended.—It has been held, before the passing of the 1 & 2 Vict. c. 110, that estates in reversion on leases for lives or years might be extended, and the plaintiff have the rent which falls due after the return of the inquisition.⁽⁸⁾ Also that rent charges,⁽⁹⁾ lands in ancient demesne,⁽¹⁰⁾ the wife's lands, which the husband has during the coverture, and the lands of a bishop,⁽¹¹⁾ might be extended. A term for years may either be extended or treated as part of the personalty.⁽¹²⁾ But an advowson in gross, the glebe belonging to an ecclesiastical benefice, or the churchyard,⁽¹³⁾ a rent-seck,⁽¹⁴⁾ or any tenement which

(1) 1 & 2 Vict. c. 110, s. 11.

(2) *Ibid.* s. 17; *Hughes v. Lumley*, 4 E. & B. 274; *Westbrooke v. Blythe*, 3 E. & B. 737.

(3) 2 & 3 Vict. c. 11, s. 5.

(4) *Fenny v. Durant*, 1 B. & Ald. 40; *Doe d. Davies, v. Creed*, 5 Bing. 327.

(5) *Morris v. Jones*, 3 D. & R. 603.

(6) *Doe v. Jones*, 10 B. & C. 459.

(7) *Hunt v. Coles*, Com. R. 226.

(8) *Sharp v. Key*, 8 M. & W. 379.

(9) *Martin v. Wilks*, Moore, 32.

(10) *Cox v. Barnsley*, Hob. 47.

(11) Dalt. "Sheriff," 136.

(12) *Fleetwood's case*, 8 Rep. 171.

(13) Gilb. Exec. 39, 40.

(14) *Walsall v. Heath*, Cro. Eliz. 658.

cannot be granted over, as the office of filacer or the like,⁽¹⁾ could not before, and probably cannot since, stat. 1 & 2 Vict. be extended. It has been held under the Statute of Frauds, and the words with reference to trust estates in the 1 & 2 Vict. c. 110 nearly resemble the language of the former act, that an equity of redemption was not within it.⁽²⁾ It seems doubtful whether the statute includes a mere equitable interest in a chattel.⁽³⁾ It does not extend to a trust created by the debtor in favour of himself and another person.⁽⁴⁾ It seems that lands of a municipal corporation are not exempt.⁽⁵⁾

Proceedings in executing the writ.—Upon receipt of the *elegit* the sheriff must impanel a jury, who are to inquire of all the goods and chattels of the debtor, and appraise the same, and also to inquire as to his lands and tenements, and their value.⁽⁶⁾ After inquisition had, the sheriff delivers to the execution creditor all the goods and chattels of the debtor (except his oxen and beasts of the plough), at the value set upon them by the jury; if they be insufficient he delivers also execution of the lands, and he then returns the writ that it may be recorded in the court out of which the *elegit* issued. The possession of the lands delivered by the sheriff is legal, not actual, and the execution creditor must therefore proceed by ejectment if he cannot obtain possession without force.⁽⁷⁾ The inquisition must find the lands with certainty, the place and county where they lie, and where the inquisition is taken,⁽⁸⁾ the estate the defendant has in them,⁽⁹⁾ and their value.⁽¹⁰⁾ The sheriff need not, since the 1 & 2 Vict. c. 110, set out the lands by metes and bounds, it is sufficient that he describe them with such a degree of accuracy that they may be readily identified.⁽¹¹⁾ The inquisition may be bad as to

⁽¹⁾ *Anon.* Dyer, 7 c.

⁽²⁾ *Plunket v. Penson*, 2 Atk. 290.

⁽³⁾ *Scott v. Sholey*, 8 East, 467.

⁽⁴⁾ *Doe v. Greenhill*, 4 B. & Ald. 684.

⁽⁵⁾ *Doe d. Parr v. Roe*, 1 Q. B. 700.

⁽⁶⁾ Dalt. 134.

⁽⁷⁾ *Taylor v. Cole*, 3 T. R. 295. But see *Rogers v. Pitcher*, 6 Taunt. 207.

⁽⁸⁾ *Raysig's case*, Dy. 208.

⁽⁹⁾ *Heard v. Baskerfield*, Brownl. 38.

⁽¹⁰⁾ *Sparrow v. Mattersock*, Cro. Car. 319.

⁽¹¹⁾ *Sherwood v. Clark*, 15 M. & W. 764; *Doe v. Parry*, 13 M. & W. 356.

some lands and good as to others.⁽¹⁾ If lands have been extended, the inquisition must be returned and filed as well as the writ; otherwise not.⁽²⁾ The defendant may compel the plaintiff to enter the return on the roll.⁽³⁾ The defendant is entitled to have his lands back as soon as the judgment is satisfied; and he may recover them by ejectment, by *sci. fa. ad rehabendam terram*, by bill in equity, or by application to the court.⁽⁴⁾

Forms of elegit.—The following forms of the writ of *elegit* are given in the Schedule to Reg. Gen. H. T. 1853. They are numbered in the schedule in the same manner as here.

No. 9. Writ of Elegit on a Judgment for Plaintiff.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of _____, greeting: Whereas A. B., lately in our Court of Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas," as the case may be] by the judgment of the same court, recovered against C. D., £ _____ [the amount of all the moneys recovered by the judgment] whereof the said C. D. is convicted, and afterwards the said A. B. came into our said court, and, according to the form of the statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the day of _____ in the year of our Lord _____⁽⁵⁾, on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said statutes, until the said sum, together with interest thereon, at the rate of four pounds per centum per annum, from the _____ day of _____ in the year of our Lord _____⁽⁶⁾, shall

(1) *Morris v. Jones*, 2 B. & C. 242.

(2) *Stonehouse v. Owen*, 2 Str. 874; *Hoe's case*, 5 Rep. 90 a.

(3) *Casseldine v. Munday*, 2 Dowl. 169.

(4) *Price v. Varney*, 5 D. & R. 612.

(5) The day on which the judgment was entered up.

(6) The day on which the judgment was entered up; or, in case the judgment was entered up prior to the 1st October, 1838, say, "from the 1st day of October, in the year of our Lord, 1838."

have been levied. Therefore we command you * that [*if sued out of the Court of Exchequer say*, "Therefore we command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and,"] without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of ⁽¹⁾, or at any time afterwards, over which the said C. D., on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure, to him and to his assigns, until the said £ , together with interest as aforesaid, shall have been levied. And in what manner you shall have executed this our writ, make appear to us [*or in the Common Pleas*, "to our justices," *or in the Exchequer*, "to the barons of our Exchequer," *as the case may be*] at Westminster, immediately after the execution hereof, under your seal, and the seals of those by whose oath you shall make the said extent and appraisement, and have you there then this writ. Witness at Westminster, the day of in the year of our Lord .

No. 10. *Writ of Elegit on a Rule for Payment of Money.*

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of greeting: Whereas lately in our Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by a rule of the said court, dated the day of , in the year of our Lord , the sum of £ was ordered to be paid by C. D. to A. B., and afterwards the said A. B. came into our said court, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the day of in the year of our Lord ⁽²⁾, on which day the said rule was made, or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him

⁽¹⁾ The day on which judgment was entered up.

⁽²⁾ The day on which the rule was made.

the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure thereof, to him and his assigns, until the said sum, together with interest upon the same at the rate of four pounds per centum per annum, from the said day of in the year of our Lord ⁽¹⁾, shall have been levied. Therefore we command you. [*The same as in No. 9 from the * , inserting the date of the day on which the rule was made, instead of that on which the judgment was entered up.*]

No. 11. Writ of Elegit on a Rule for Payment of Money and Costs.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith. To the sheriff of greeting : Whereas, lately in our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by a rule of the said court, dated the day of , in the year of our Lord , the sum of £ was ordered to be paid by C. D. to A. B., together with certain costs in the said rule mentioned, which said costs were afterwards, on the day of , in the year of our Lord , taxed and allowed by our said court, at £ ; and afterwards the said A. B. came into our said court, and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the day of , in the year of our Lord ⁽²⁾, or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments, respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest upon the same, at the rate of four pounds per centum per annum, from the said day of , in the year of our Lord ⁽¹⁾, shall have been levied. Therefore, we command you, that [*if sued out of the Court of Exchequer, say, "Therefore we command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and,"*] without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of

⁽¹⁾ The day on which the rule was made.

⁽²⁾ The day on which the costs of the rule were taxed.

copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of (¹), or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ , and £ , together with interest, as aforesaid, shall have been levied. And in what manner, &c. [*The same as in No. 9 to the end.*]

No. 12. Writ of Elegit on a Judgment of an Inferior Court, removed into one of the Superior Courts.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of , greeting : Whereas, A. B., lately in [*insert the style of the court*] by the judgment of the said court, recovered against C. D. £ , whereof the said C. D. is convicted : And whereas the said judgment was afterwards, on the day of , in the year of our Lord , removed into our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by virtue of an order of that our said court [*or "of , one of the justices of that our said court," as the case may be*] in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said order, and upon the said removal were afterwards, on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] at £ ; and afterwards the said A. B. came into that our said court [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of the said day of , in the year of our Lord, aforesaid, (²) or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively,

(¹) The day on which the costs of the rule were taxed.

(²) The day on which the costs of removing the judgment were taxed.

according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest upon the same, at the rate of four pounds per centum per annum, from the said day of _____, in the year of our Lord _____ (1), shall have been levied. Therefore, we command you that, [*if sued out of the Court of Exchequer say*, "Therefore we command you, that you omit not by reason of any liberty of your county, but that you enter the same, and "] without delay, you cause to be delivered to the said C. B., by a reasonable price and extent, all the goods and chattels of the said C. D., in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the said _____ day of _____ (1), or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £ _____ and £ _____, together with interest as aforesaid, shall have been levied. And in what manner, &c. [*as in No. 9 to the end.*]

No. 13. Writ of Elegit on a Rule or Order for Payment of Money made in an Inferior Court and removed into one of the Superior Courts.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of _____, greeting: Whereas, lately in [*insert the style of the court*] by rule [*or "order"*] of the said court, entitled, [*as the case may be*] the sum of £ _____ was, by the said court ordered to be paid by C. D. to A. B.: And whereas the said rule [*or "order"*] was afterwards, on the _____ day of _____, in the year of our Lord _____, removed into our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by virtue of an order of that our said court, [*or "of one of the justices of that our said court," as the case may be*] in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal were afterwards, on the _____ day of _____, in the year of our Lord _____, taxed and allowed by our said Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] at £ _____, and afterwards the said A. B. came into that our said court, and, according to the form of the statute in such case made and provided, chose to be

(1) The day on which the costs of removing the judgment were taxed.

delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of , in the year of our Lord ,⁽¹⁾ or at any time afterwards, or over which the said C. D., on the said day of ,⁽¹⁾ or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums, together with interest on the same, at the rate of four pounds per centum per annum, from the said day of ,⁽¹⁾ shall have been levied. Therefore we command you that, [*if sued out of the Court of Exchequer say,* "Therefore we command you omit not, by reason of any liberty of your county, but that you enter the same, and,"] without delay, you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the said day of ,⁽¹⁾ or at any time afterwards, or over which the said C. D. on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof to him and to his assigns, until the said several sums of £ and £ , together with interest as aforesaid shall have been levied. And in what manner, &c., [*as in No. 9 to the end.*]

No. 14. Writ of Elegit on a Rule or Order for Payment of Money and Costs made in an Inferior Court and removed into one of the Superior Courts.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of , greeting: Whereas, lately in [*insert the style of the court*] by a rule [*or "order,"*] of the said court, entitled, [*as the case may be*] the sum of £ was, by the said court, ordered to be paid by C. D. to A. B., together with costs of the said rule [*or "order,"*] which said costs were afterwards, on the day of , in the

⁽¹⁾ The day on which the costs of removing the rule of the inferior court into the superior court were taxed.

year of our Lord , taxed and allowed by the said court at £ : And whereas the said rule, [*or "order,"*] was afterwards, on the day of , in the year of our Lord , removed into our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*], by virtue of an order of that our said court [*or "of , one of the justices of that our said court," as the case may be*], in pursuance of the statute in that case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order, and upon the said removal, were afterwards, on the day of , in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*], at £ ; and afterwards the said A. B. came into our said Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] and, according to the form of the statute in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of ,⁽¹⁾ or at any time afterwards, or over which the said C. D., on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums, together with interest upon the same, at the rate of four pounds per centum per annum, from the said day of ,⁽¹⁾ shall have been levied. Therefore we command you that, [*if sued out of the Court of Exchequer say, "Therefore, we command you, that you omit not, by reason of any liberty of your county, but that you enter the same, and,"*] without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said day of , or at any time afterwards, or over which the said C. D., on that day, or at any time afterwards, had any disposing power, which he might, without the assent of any other person, exercise for his own benefit, to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents and hereditaments respectively, according to the nature and tenure thereof,

⁽¹⁾ The day on which the costs of removing the rule of the inferior court into the superior court were taxed.

to him and to his assigns until the said three several sums of £ and £ and £ , together with interest as aforesaid, shall have been levied. And in what manner, &c. [as in No. 9 to the end.]

5. *Of the Execution of the Writ of Capias ad Satisfaciendum.*

Against whom ca. sa. may issue.—It is a general rule that where a party may be held to bail under a *capias* he may be arrested under a *ca. sa.*⁽¹⁾ An infant,⁽²⁾ or a *feme covert*⁽³⁾ may be arrested under it; but in the latter case, if the husband also be arrested, and the wife has no separate property, or if the husband and plaintiff collude to keep her in custody, the court in its discretion may order her discharge.⁽⁴⁾ Members of the Royal Family, Peers and Peeresses, and Members of the House of Commons during their time of privilege cannot be taken under it.⁽⁵⁾ It does not lie against ambassadors or their servants; ⁽⁶⁾ nor against servants of the Queen, unless with the Lord Chamberlain's leave; ⁽⁷⁾ nor against seamen, marines, or soldiers, unless the debt be 30*l.* or upwards, and was contracted previously to their entering the service; ⁽⁸⁾ nor against executors or administrators for the debts of their testator, unless a *devastavit* have been returned; ⁽⁹⁾ nor against corporators or hundredors; ⁽¹⁰⁾ nor against bankrupts who have obtained their certificate, for any debt which may have been proved under their commission; or who have obtained a certificate under the 12 & 13 Vict. c. 106, s. 216, as to debts due at the time of their petition, if the creditor received the notice required by the act; ⁽¹¹⁾ nor against persons discharged under the Insolvent Debtors Act for debts contracted before such discharge, or against an insolvent under the judgment entered up on the warrant of attorney executed by him on

⁽¹⁾ *Harbert's case*, 3 Rep. 12 a.

⁽²⁾ *Gardiner v. Holt*, 3 Str. 1217.

⁽³⁾ *Banyon v. Jones*, 15 M. & W. 566; *Newton v. Rowe*, 9 Q. B. 948.

⁽⁴⁾ *Edwards v. Martyn*, 17 Q. B. 693; *Larkin v. Marshall*, 4 Exch. 804; *Sparkes v. Bell*, 8 B. & C. 1; *Newton v. Rowe*, 8 Sc. N. R. 26.

⁽⁵⁾ *Cassidy v. Stewart*, 2 Sc. N. R. 432; *Digby v. Alexander*, 9 Bing. 412.

⁽⁶⁾ 7 Anne, c. 12, s. 3.

⁽⁷⁾ *Bartlett v. Hebbes*, 5 T. R. 688.

⁽⁸⁾ 17 & 18 Vict. c. 48, s. 52; 17 & 18 Vict. c. 6, s. 56.

⁽⁹⁾ *Brooke's Abr. "Execution,"* 12; *Ward v. Thomas*, 2 Dowl. 87.

⁽¹⁰⁾ *Wata. Sheriff*, 191, 2nd edit.

⁽¹¹⁾ *Levy v. Horns*, 5 Exch. 257; *Norton v. Walker*, 3 Exch. 480.

obtaining his discharge.⁽¹⁾ If a *ca. sa.* be executed in a case where it does not lie, the court or a judge will discharge the prisoner.⁽²⁾

Where debt less than 20l.]—The 7 & 8 Vict. c. 96, s. 57, provides, that from and after the passing thereof no person shall be taken or charged in execution upon any judgment obtained in any of Her Majesty's superior courts, or in any County Court, Court of Requests, or other inferior court, in any action for the recovery of any debt, wherein the sum recovered shall not exceed the sum of 20l., exclusive of the costs recovered by such judgment.⁽³⁾ But by the 59th section the judge may, in certain cases, order that the defendant may be taken and detained in execution in like manner as if the act had not passed. The act applies to a case where a judgment exceeding 20l. has been subsequently reduced below that amount;⁽⁴⁾ but it does not apply to the case of an action on a judgment exceeding 20l., though the action in which it was obtained was for a debt below 20l.⁽⁵⁾ It applies to a case on which judgment has been entered up on a warrant of attorney confessing judgment for 500l., where the arrears of an annuity for which it was entered up are less than 20l.⁽⁶⁾

Arrest, how made.]—As to the arrest, any touching of the defendant's person, however slight, is an arrest.⁽⁷⁾ And, although bare words will not make an arrest,⁽⁸⁾ yet if the party is under restraint, and the officer manifests an intention to make a caption, it is not necessary that there should be actual contact.⁽⁹⁾ At the time of the arrest the warrant should be produced, or the party arrested made aware of it.⁽¹⁰⁾ Upon an arrest in execution the defendant may be taken at once to the county gaol.⁽¹¹⁾ In practice he is

(1) See *Rivett v. Lark*, 3 Dowl. 62.

(2) *Green v. Rohan*, 4 Dowl. 659.

(3) *Walker v. Hewlett*, 6 D. & L. 732; *Harris v. Parker*, 3 Dowl. 451.

(4) *Churchill v. Siggers*, 3 E. & B. 929.

(5) *Royle v. Consterdine*, 10th June, 1845, Exch.; cited 1 Chit. Arch. 611 8th edit.

(6) *Johnson v. Harris*, 15 C. B. 357.

(7) *Gener v. Spark*, 1 Salk. 79.

(8) Buller's N. P. 62.

(9) *Williams v. Jones*, Hardw. 301; *Russen v. Lucas*, 1 Car. & P. 163; *Grainger v. Hill*, 4 Bing. N. C. 212.

(10) *Robins v. Hender*, 3 Dowl. 543.

(11) *Evans v. Atkins*, 4 T. R. 555.

usually taken to the house of the sheriff's officer.⁽¹⁾ Where the arrest is illegal the sheriff cannot detain the party in custody under another writ; ⁽²⁾ but if the irregularity arise from no default on his part, the defendant may be detained under a writ or warrant at the suit of another party; but not of the party at whose suit he was originally arrested.⁽³⁾

Detainer where defendant in prison.—If the defendant is already in the prison of the county, he is charged in execution by a judge's order, made upon affidavit that judgment has been signed and is not satisfied; and the service of such order on the keeper of the prison has the effect of a detainer.⁽⁴⁾

Defendant when discharged.—The defendant is entitled to be discharged upon satisfaction of the judgment. The payment should be made to the plaintiff or his attorney on the record; ⁽⁵⁾ for if made to the sheriff or his officer, or to the keeper of the Queen's prison, it is not deemed a payment to plaintiff, and is not therefore a satisfaction of the judgment.⁽⁶⁾ The defendant is not entitled to be discharged because the plaintiff has died, and there is no personal representative.⁽⁷⁾ By the C. L. P. Act, 1852, s. 126, a "written order under the hand of the attorney in the cause, by whom any writ of *ca. sa.* shall have been issued, shall justify the sheriff, gaoler, or person in whose custody the party may be under such writ, in discharging such party, unless the party for whom such attorney professes to act shall have given written notice to the contrary to such sheriff, gaoler, or person in whose custody the opposite party may be; but such discharge shall not be a satisfaction of the debt, unless made by the authority of the creditor; and nothing herein contained shall justify any attorney in giving such order for discharge without the consent of his client." As the defendant when arrested is considered to be in custody upon all the writs in the sheriff's hands, search should be made,

⁽¹⁾ See *Houlditch v. Birch*, 4 Taunt. 608.

⁽²⁾ *Hooper v. Lane*, 10 Q. B. 545; *Barratt v. Price*, 9 Bing. 569.

⁽³⁾ *Eggington's case*, 2 E. & B. 718.

⁽⁴⁾ C. L. P. Act. 1852, s. 127.

⁽⁵⁾ *Morton's case*, 2 Show. 139; *Savory v. Chapman*, 11 A. & E. 829.

⁽⁶⁾ *Woods v. Finnis*, 7 Exch. 363; *Connop v. Challis*, 2 Exch. 484; *Hackford v. Austen*, 14 East, 468.

⁽⁷⁾ *Taylor v. Burgess*, 16 M. & W. 781.

before discharging him, in the sheriff's office, to ascertain whether there be other writs against him.⁽¹⁾

Escape.]—An escape is where a person, under lawful arrest and restraint, evades such arrest and restraint, or is suffered to go at large before being delivered by due course of law.⁽²⁾ If he is suffered to go about, though in custody of an officer, it is an escape,⁽³⁾ unless it be under *habeas corpus*, or the order of a court of competent jurisdiction, or in a foreign county, where he is watched day and night by the sheriff's bailiff.⁽⁴⁾ If the sheriff receive the debt, and, before payment to the plaintiff, liberate the defendant, it is an escape.⁽⁵⁾ It is no escape if the sheriff or gaoler liberate the prisoner on the written order of the plaintiff's attorney in the cause, unless the plaintiff has given him written notice to the contrary.⁽⁶⁾ Neither is it an escape if the custody was unlawful.⁽⁷⁾ If the escape be negligent, fresh pursuit may be made, and the defendant retaken.⁽⁸⁾ If he was in custody of the keeper of the Queen's prison, an escape warrant may be obtained by application to a judge at Chambers, and the defendant may be retaken under it in any part of England.⁽⁹⁾ But if the escape be voluntary, i.e., with the express consent of the sheriff or officer, &c., even though he were acting under a mistake, he can never retake the defendant.⁽¹⁰⁾ The sheriff, bailiff, or other person having the custody of the defendant at the time of the escape is liable to an action on the case for damages sustained by the person at whose suit the defendant was taken, but not now as formerly to an action of debt.⁽¹¹⁾ And after paying the debt he has no remedy over against the defendant if the escape was voluntary.⁽¹²⁾

(1) *Samuel v. Buller*, 1 Exch. 439; *Wright v. Stamford*, 1 Dowl. N. S. 272.

(2) Bac. Abr. 122.

(3) *Benton v. Sutton*, 1 B. & P. 24; *Hawkins v. Plomer*, 2 W. Bl. 1048.

(4) *Nias v. Davis*, 4 C. B. 444.

(5) *Crozer v. Pilling*, 4 B. & C. 31.

(6) C. L. P. Act, 1852, s. 126.

(7) *Lane v. Chapman*, 11 A. & E. 968.

(8) *Filewood v. Clement*, 6 Dowl. 508.

(9) 1 Anne, c. 6; 5 Anne, c. 9; *Anderson v. Haughton*, 1 B. & A. 608.

(10) *Filewood v. Clement*, 6 Dowl. 508.

(11) 5 & 6 Vict. c. 98, s. 31.

(12) *Pitcher v. Bailey*, 8 East, 171; *Gillott v. Aston*, 2 Dowl. N. S. 413.

What return made.—The sheriff, if he has taken the defendant, returns that fact, stating in what prison he is,⁽¹⁾ or that he is so ill that he cannot be removed without endangering his life.⁽²⁾ If the sheriff has not been able to find the defendant, he returns *non est inventus*.⁽³⁾ If he could not take him on account of privilege, he may return that fact.⁽⁴⁾ If the return be false an action lies against the sheriff, and it is false if the defendant go about openly, and the undersheriff in the country, or the bailiff to whom the writ was directed have notice thereof, and *non est inventus* is returned.⁽⁵⁾

Form of ca. sa.—The following forms of the writ of ca. sa. are given in the schedule to Reg. Gen. H. T. 1853. They are numbered in the schedule in the same manner as here.

No. 15. *Writ of Capias ad Satisfaciendum on a Judgment for Plaintiff.*

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of _____, greeting : We command you, that you [*if sued out of the Court of Exchequer say*, "we command you that you omit not by reason of any liberty of your county, but that you enter the same, and"] take C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in Common Pleas "before our justices," or in the Exchequer "before the barons of our Exchequer," as the case may be*] at Westminster, immediately after the execution hereof, to satisfy A. B. £ _____ [*the amount of all the moneys recovered by the judgment*] which the said A. B. lately in our Court of Queen's Bench [*or "Common Pleas," or Exchequer of Pleas," as the case may be*] recovered against the said C. D., whereof the said C. D. is convicted, together with interest upon the said sum, at the rate of four pounds per centum per annum, from the _____ day of _____, in the year of our Lord _____, (⁶) on which day the judgment

(1) *R. v. Sheriff of Wilts*, 1 Bing. 423.

(2) *Jones v. Robinson*, 11 M. & W. 758; *Cavenagh v. Collett*, 4 B. & Ald. 280.

(3) *Key v. Mackyntire*, 5 Dowl. 453.

(4) *Inge v. Herrick*, Doug. 675; Wats. Sheriff, 196, 2nd edit.

(5) *Beckford v. Montague*, 2 Esp. 475; *Gibson v. Coggan*, 2 Camp. 189; *Dyke v. Duke*, 4 Bing. N. C. 197.

(6) The day on which the judgment was entered up, or if entered up prior to the 1st of October, 1838, say "from the 1st day of October, in the year of our Lord 1838," omitting the words "on which day the judgment aforesaid was entered up."

aforesaid was entered up; and have you there then this writ. Witness
 at Westminster, the day of , in the year of our
 Lord .

No. 16. Writ of Capias ad Satisfaciendum on a Judgment for Defendant.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of greeting : We command you, that you take [*if sued out of the Court of Exchequer say*, "that you omit not by reason of any liberty of your county, but that you enter the same and take,"] A. B. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, "before our justices," *or in the Exchequer*, "before the barons of our Exchequer," *as the case may be*] at Westminster, immediately after the execution hereof, to satisfy C. D. £ , which lately in our Court of Queen's Bench, *or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] were awarded to the said C. D. for his costs of defence in an action lately prosecuted in our said court by the said A. B. against the said C. D., whereof the said A. B. is convicted, together with interest upon the said sum at the rate of four pounds per centum per annum from the day of , in the year of our Lord , ⁽¹⁾ on which day the judgment aforesaid was entered up; and have you there then this writ. Witness, &c.

No. 17. Writ of Capias ad Satisfaciendum on a Rule for Payment of Money.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith. To the sheriff of greeting : We command you, that you take [*if sued out of the Court of Exchequer say*, "We command you that you omit not by reason of any liberty of your county, but that you enter the same, and take,"] C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, "before our justices," *or in the Exchequer*, "before the barons of our Exchequer," *as the case may be*] at Westminster, immediately after the execution hereof, to satisfy A. B. £ , which lately in our Court of Queen's Bench, *or* "Common Pleas," *or* "Exchequer of Pleas," *as the case may be*] by a rule of our said court, dated the day of , in the year of our Lord , were ordered to be paid by the said C. D. to the said A. B., and further to satisfy the

⁽¹⁾ The day on which the judgment was entered up, or if entered up prior to the 1st of October, 1838, say "from the 1st day of October, in the year of our Lord 1838," omitting the words, "on which day the judgment aforesaid was entered up."

said A. B., interest upon the said sum at the rate of four pounds per centum per annum from the day and year aforesaid,⁽¹⁾ and have you there then this writ. Witness, &c.

No. 18. Writ of Capias ad Satisfaciendum on a Rule for Payment of Money and Costs.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of _____, greeting : We command you, that you take [*if sued out of the Court of Exchequer say*, "We command you that you omit not by reason of any liberty of your county, but that you enter the same and take,"] C. D. if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, "before our justices," *or in the Exchequer*, "before the barons of our Exchequer," *as the case may be*] at Westminster, immediately after the execution hereof, to satisfy A. B. £ _____, which lately in our Court of Queen's Bench, or "Common Pleas," or "Exchequer of Pleas," *as the case may be*] by a rule of our said court, dated the _____ day of _____, in the year of our Lord _____, were ordered to be paid by the said C. D. to the said A. B., together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said court at £ _____, [*the amount of the allocatur or allocaturs, if more than one*] and further to satisfy the said C. D. the said last-mentioned sum, together with interest upon the said two several sums, at the rate of four pounds per centum per annum from the _____ day of _____, in the year of our Lord _____,⁽²⁾ on which day the said costs were taxed ; and have you there then this writ. Witness, &c.

No. 19. Writ of Capias ad Satisfaciendum on a Rule for Payment of Costs only.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of _____, greeting : We command you, that you take [*if sued out of the Court of Exchequer say*, "We command you that you omit not by reason of any liberty of your county, but that you enter the same and take,"] C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, "before our justices," *or in the Exchequer*, "before the barons of our Exchequer," *as the case may be*] at Westminster, immediately

⁽¹⁾ The day on which the rule was made, or if it were made prior to the 1st of October, 1838, say "from the 1st day of October, in the year of our Lord, 1838."

⁽²⁾ The day on which the costs of the rule were taxed. If interest be claimed on the principal money from the date of the rule, alter the form accordingly.

after the execution hereof, to satisfy A. B. £ for certain costs which by a rule of our Court of Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas," *as the case may be*] dated the day of in the year of our Lord , were ordered to be paid by the said C. D. to the said A. B., which said costs have been taxed and allowed by our said court at the said sum, and further to satisfy the said C. D., interest upon the said sum at the rate of four pounds per centum per annum, from the day of , in the year of our Lord ; (1) and have you there then this writ. Witness, &c.

No. 20. Writ of Capias ad Satisfaciendum on a Judgment in an Inferior Court removed into one of the Superior Courts.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of greeting : We command you, that you take [*if sued out of the Court of Exchequer say*, "We command you that you omit not by reason of any liberty of your county, but that you enter the same, and take,"] C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas*, "before our justices," *or in the Exchequer*, "before the barons of our Exchequer," *as the case may be*] at Westminster, immediately after the execution hereof, to satisfy A. B. £ , which the said A. B. lately in [*insert the style of the court*] by the judgment of the said court recovered against the said C. D., whereof the said C. D. is convicted, and which judgment was afterwards, on the day of in the year of our Lord , removed into our Court of Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas," *as the case may be*] by virtue of an order of that our said court, [or "of one of the justices of that our said court," *as the case may be*] in pursuance of the statute in such case made and provided ; and the costs and charges attendant upon the application for the said order and upon the said removal were on the day of in the year of our Lord , taxed and allowed by our said Court of Queen's Bench, [or "Common Pleas," or "Exchequer of Pleas," *as the case may be*] at £ , and further to satisfy the said A. B. the said £ (2) together with interest upon the said two several sums at the rate of four pounds per centum per annum from the said day of in the year of our Lord, ; (3) and have you there then this writ. Witness, &c.

(1) The day on which the costs of the rule were taxed, or if there have been several allocatur, the day on which the last allocatur was made.

(2) The costs attendant upon the removal of the judgment out of the inferior court into the superior court.

(3) The day on which the costs of removal were taxed.

No. 21. *Writ of Capias ad Satisfaciendum on a Rule or Order of an Inferior Court for Payment of Money removed into one of the Superior Courts.*

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of _____ greeting : We command you, that you take [*if sued out of the Court of Exchequer say*, "we command that you omit not by reason of any liberty of your county, but that you enter the same and take"] (1) C. D., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us, [*or in the Common Pleas*, "before our justices," *or in the Exchequer* "before the barons of our Exchequer," *as the case may be*] at Westminster, immediately after the execution hereof, to satisfy A. B. £ _____, which lately in [*insert the style of the court*] by a rule [*or "order"*] of the said court, entitled [*as the case may be*] were ordered to be paid by the said C. D. to the said A. B., and which rule [*or "order"*] was afterwards, on the _____ day of _____, in the year of our Lord _____, removed into our Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by an order of that our said court, [*or "of _____, one of the justices of our said court," as the case may be*] in pursuance of the statute in such case made and provided, and the costs and charges attendant upon the application for the said last-mentioned order and upon the said removal were on the _____ day of _____, in the year of our Lord _____, taxed and allowed by our said Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] at £ _____ and also to satisfy the said A. B. the said £ _____, (1) together with interest on the said two several sums at the rate of four pounds per centum per annum from the said _____ day of _____, in the year of our Lord _____; (2) and have you there then this writ. Witness, &c.

No. 22. *Writ of Capias ad Satisfaciendum on a Rule or Order of an Inferior Court for Payment of Money and Costs removed into one of the Superior Courts.*

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of _____, greeting: We command you that you take [*if sued out of the Court of Exchequer say*, "That you omit not, by reason of any liberty of your county, but that you enter the same and take"] C. D., if he shall be found in your bailiwick, and him safely keep so that you may have his body before us [*or in the Common Pleas*, "before our justices," *or in the Exchequer*, "before the barons of our Exchequer" [*as the case may be*] at Westminster, immediately after the execution

(1) The costs of removing the rule from the inferior court into the superior court.

(2) The day on which the costs of removal were taxed.

hereof to satisfy A. B. £ , which lately, in [*insert the style of the court*] by a rule [*or "order"*] of the said Court, entitled [*etc., as the case may be*] were by the said court ordered to be paid by the said C. D. to the said A. B., which said rule [*or "order"*] was afterwards, on the day of , in the year of our Lord , removed into our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] by an order of that our said court [*or "of , one of the justices of that our said court" as the case may be*] in pursuance of the statute in such case made and provided, and the costs and charges attendant on the application for the said last-mentioned order, and upon the said removal, were upon the day of , in the year of our Lord , taxed and allowed by our said Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] at £ , and also to satisfy the said A. B. the said £ ,⁽¹⁾ together with interest on the said three several sums, at the rate of four pounds per centum per annum, from the day of , in the year of our Lord ;⁽²⁾ and have you there then this writ. Witness, &c.

6. *Of Execution in Detinue.*

Order for execution for return of chattel.—In actions of detinue the plaintiff may now have execution for the return of the chattel absolutely. Application for this purpose may be made to the court or a judge by the plaintiff, who, if they see fit, order "that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, and that if the said chattel cannot be found, and unless the court or a judge should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render such chattel, or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel."⁽³⁾

Execution for damages, costs and interest in action.—The plaintiff, either by the same or a separate writ of execution, is entitled to have made of the defendant's goods the damages, costs and interest in such action.⁽⁴⁾

(1) The costs of removing the rule from the inferior court into the superior court.

(2) The day on which the costs of removing the rule from the inferior court were taxed.

(3) C. L. P. Act, 1854, s. 78.

(4) *Ibid.*

Form of writ.—The following forms of writs of execution are given by Reg. Gen. M. V. 1854, and scheds. 33, 34 :

Writ of Execution in Detinue under Section 78 of the Common Law Procedure Act, 1854, for the Return of the Chattel detained, and for a Distringas until returned, separate from a Writ for Damages or Costs :

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of _____, greeting : We command you that you omit not by reason of any liberty of your county, but that you enter the same and without delay you cause the following chattels, that is to say [*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*] to be returned to A. B., which said A. B. lately in our court before us [*or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer"*] at Westminster, recovered against C. D., in an action for the detention of the same, whereof the said C. D. is convicted.* And we further command you, that if the said chattels cannot be found in your bailiwick you omit not, by reason of any liberty of your county, but that you enter the same and distrain the said C. D. by all his lands and chattels in your bailiwick, so that neither the said C. D., nor any one for him, do lay hands on the same until the said C. D. render to the said A. B. the said chattels; and in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas, "to our justices," or in Exchequer, "to the barons of our Exchequer"*] at Westminster, immediately after the execution hereof; and have you there then this writ. Witness _____ at _____ Westminster the day of _____, in the year of our Lord _____.

The like, but instead of a Distress until the Chattel is returned, commanding the Sheriff to levy on Defendant's Goods the Assessed Value of it.

[*Proceed as in the preceding form until the * and then thus*]: And we further command you that if the said chattels cannot be found in your bailiwick you omit not, by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of the said C. D. in your bailiwick you cause to be made £ _____ [*the assessed value of the chattels*] whereof the said C. D. is also convicted, and that in the execution of this our last-mentioned command you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf, and in what manner you shall have executed this our writ make appear to us [*or in the Common Pleas, "to our justices," or in the Exchequer, "to the barons of our Exchequer," as the case may be*] at Westminster, immediately after the execution hereof; and have you there then this writ. Witness _____, at _____ Westminster the _____ day of _____, in the year of our Lord _____.

7. *Of Execution where Matter of Account decided by the Court or a Judge, or referred under the Common Law Procedure Act, 1854, s. 3.*

Where the matters in dispute, being matters of account, have been decided by the court or a judge, or have been referred to an arbitrator appointed by the parties, or to an officer of the court, or County Court judge, under section 3 of the C. L. P. Act, 1854, the decision or order of the court or judge, or the award or certificate of the referee, is enforceable by the same process as the finding of a jury upon the matter referred.⁽¹⁾

Form of writs of execution.—The following forms of writs of execution are contained in the Reg. Gen. M. V. 1854, sched. 9 and 10 :—

Writ of Execution where the Court or a Judge decides on Matters of Account.

[*The same as in ordinary cases of execution on a judgment, except that, instead of the writ stating the money to be levied as having been recovered by a judgment, and omitting the direction to levy interest, say*]
 “£ , which by a rule of our Court of Queen’s Bench [or
 “Common Pleas,” or “by an order of Sir , knight, one of our
 justices of our Court of Queen’s Bench,” or “Common Pleas,” or “one
 of the barons of our Exchequer,” as the case may be] dated the
 day of , 18 , made in pursuance of the 3rd section of “The
 Common Law Procedure Act, 1854,” in an action commenced in our
 said court of , at the suit of A. B. [or “the said A. B.” if
 before mentioned] against the said C. D., was ordered to be paid by
 the said C. D. to the said A. B. [as the case may be, following the terms
 or substance of the rule or order.] [If costs were ordered to be paid
 then the direction to levy them may be thus:] Together with certain
 costs in the said rule (or “order”) mentioned, which said costs were
 afterwards, on the day of 18 , taxed and allowed by
 our said Court of , at £ .] [If the rule or order directs
 that interest shall be paid, then the direction to levy it may be thus :
 “together also with interest on the said sum of £ , at the rate
 of £ per cent. from the said day of 18 ,” as the
 case may be, according to the rule or order.]

Writ of Execution where Matter of Account is referred to and decided on by an Arbitrator, Officer of the Court, or County Court Judge.

[*The same as directed in preceding form; but instead of stating the levy to be of money ordered by a rule or order to be paid, say,*
 “£ , which by an award (or certificate), dated the day

(1) C. L. P. Act, 1854, s. 3.

of 18 , [date of award or certificate] made by E. F., Esquire, an arbitrator appointed by the parties [or "by G. F., Esquire, one of the Masters (or other officer, naming his office) of our court of ,," as the case may be] pursuant to the 3rd section of the "Common Law Procedure Act, 1854," was awarded [or "certified"] to be due and payable from the said C. D. to the said A. B.]

8. Of the Poundage Fees and Expenses of Execution.

In every case of execution the party entitled to execution may levy the poundage fees, and expenses of the execution, over and above the sum recovered.⁽¹⁾ The fees to which the sheriff is entitled are those given by a table made by the judges under the authority of the 7 Will. 4 & 1 Vict. c. 55, in addition to which he is, on executing a *fi. fa.*, entitled to 12*d.* for every 20*s.*, if the sum levied does not exceed 100*l.*, and 6*d.* for every 20*s.* over that sum;⁽²⁾ but no poundage is payable on executing a *ca. sa.*⁽³⁾ Though put to extra trouble and expense he cannot claim more than is given by the table of fees.⁽⁴⁾ He cannot charge a fee for "search" or "discharge."⁽⁵⁾ He is entitled to poundage on the whole proceeds, though a portion be paid to the landlord for rent;⁽⁶⁾ but there must be a levy.⁽⁷⁾ He is entitled to his poundage, however, notwithstanding the parties after seizure enter into a compromise before the sale,⁽⁸⁾ or although the judgment and execution be afterwards set aside for irregularity.⁽⁹⁾ On executing an *elegit* or *habere facias possessionem*, the sheriff is entitled to a shilling on every 20*s.* of the yearly value of the lands, &c., whereof possession or seisin is given, if it does not exceed 100*l.*, and 6*d.* on every 20*s.* of the yearly value above that sum.⁽¹⁰⁾ If the sum levied is unreasonable, the court or a judge will order the excess to be returned, with costs.⁽¹¹⁾

⁽¹⁾ C. L. P. Act, 1852, s. 123.

⁽²⁾ 28 Elix. c. 4.

⁽³⁾ 5 & 6 Vict. c. 58, s. 31.

⁽⁴⁾ *Davies v. Edmonds*, 12 M. & W. 31; *Phillips v. Viscount Canterbury*, 11 M. & W. 619; *Hutchinson v. Humbert*, 8 M. & W. 638; *Jones v. Robinson*, 2 Dowl. N. S. 1044.

⁽⁵⁾ *Masters v. Lowther*, 11 C. B. 949.

⁽⁶⁾ *Davies v. Edmonds*, 12 M. & W. 31.

⁽⁷⁾ *Graham v. Grill*, 2 M. & S. 296; *Coles v. Coates*, 11 A. & E. 826; *Brine v. Hutchinson*, 2 D. & L. 43.

⁽⁸⁾ *Chapman v. Bowlby*, 8 M. & W. 249.

⁽⁹⁾ *Rawstone v. Wilkinson*, 4 M. & S. 256.

⁽¹⁰⁾ *Nash v. Allen*, 4 Q. B. 784; *Price v. Hollis*, 1 M. & S. 105.

⁽¹¹⁾ *Bonwell v. Oakley*, 2 Taunt. 174.

The costs of an interpleader rule obtained by the sheriff cannot be levied.⁽¹⁾ The sheriff cannot refuse to execute a writ until his fees are paid.⁽²⁾ Nor is he justified in taking goods to secure his poundage, after he has consented to their being delivered to a third person under a claim of property.⁽³⁾ Where the sheriff has levied his fees he may retain the money; and, if there has been no levy of them, he may maintain an action for them against the party at whose suit the writ was executed;⁽⁴⁾ but not against his attorney in the action,⁽⁵⁾ unless there be special circumstances raising a presumption of an undertaking on his part to pay for them, as where he has appointed a special bailiff.⁽⁶⁾ The stat. 28 Eliz. c. 4, gives an action for treble damages in case of extortion against the sheriff;⁽⁷⁾ besides which the party upon whom it is committed may maintain an action for money had and received against the sheriff,⁽⁸⁾ and the party guilty of the extortion may be indicted at common law.⁽⁹⁾ The 7 Will. 4 & 1 Vict. c. 56, ss. 3, 4, gives a remedy for extortion by summary application to the court; and it is doubtful whether an action for extortion can be brought against the sheriff for taking a greater fee than allowed by this act.⁽¹⁰⁾ The application may be for a rule calling upon the sheriff to show cause why he should not return the excess, as well as upon his officers to show cause why an attachment should not issue against him for his contempt in receiving the excess.⁽¹¹⁾

9. *Of the Amendment and the setting aside of irregular Writs, and Restitution where Judgment set aside.*

Setting aside writ for irregularity.—If the writ of execution is irregular, or has been irregularly executed, the

(1) *Hammond v. Nairn*, 9 M. & W. 221.

(2) *Hescott's case*, 1 Salk. 330.

(3) *Goode v. Langley*, 7 B. & C. 26.

(4) *Evans v. Manero*, 7 M. & W. 468; *Foster v. Blakelock*, 5 B. & C. 328.

(5) *Mayberry v. Mansfield*, 9 Q. B. 754.

(6) *Maile v. Mann*, 2 Exch. 608; *Walbank v. Quarterman*, 3 C. B.; *Foster v. Blakelock*, 5 B. & C. 328.

(7) *Holmes v. Sparkes*, 12 C. B. 242; *Wrightup v. Greenacre*, 10 Q. B. 1; *Berton v. Lawrence*, 5 Exch. 816; *Pilkington v. Cook*, 16 M. & W. 615.

(8) *Scaiff v. Halifax*, 7 M. & W. 288.

(9) *Smith v. Mall*, 2 Roll. R. 263; *Sanderson v. Baker*, 3 Wils. 816.

(10) *Usher v. Wallers*, 4 Q. B. 55; *Curlewis v. Bird*, 1 Dowl. N. S. 755.

(11) *Blake v. Newburn*, 5 D. & L. 601.

court or a judge will set it aside, and order restoration of goods or money levied, if any, or the discharge of the party, if he be taken into custody. The application for the rule or order must be made within a reasonable time, and before a fresh step has been taken, unless the party applying was not aware of the irregularity until after such step had been taken.⁽¹⁾ In setting aside the execution the court frequently restrains the party from bringing any action; but it will not do so if a strong case of damage be shown.⁽²⁾ And the costs of the rule are not in general given, unless the applicant consent not to bring any action.⁽³⁾

Justifying under irregular writ.]—The party suing out the writ and his attorney may justify under an irregular writ, if it is not set aside; but they cannot if it is set aside.⁽⁴⁾ Whether set aside or not the sheriff and those acting under him are protected by it, however irregular,⁽⁵⁾ provided it be not void on the face of it.⁽⁶⁾ If the writ be set aside, the plaintiff may issue another.⁽⁷⁾

Amendment of writ.]—Writs of execution may be amended by the court or a judge, even after they have been executed and returned, in the *teste*,⁽⁸⁾ the return, the names of the parties,⁽⁹⁾ the sum recovered by the judgment,⁽¹⁰⁾ and the like, or where there has been a misprision of the clerks.⁽¹¹⁾ An amendment may be allowed after a rule *nisi* obtained to set the writ aside.⁽¹²⁾ But it will not be allowed where it would prejudice the rights of third persons, or where the defendant after execution has become bankrupt.⁽¹³⁾ The

⁽¹⁾ Reg. Gen. H. T. 1853 (Pr.) r. 135. As to what is a reasonable time, see *Constable v. Fothergill*, 2 Dowl. 591; *Greenshield v. Pritchard*, 8 M. & W. 148; *Pincher v. Harvey*, 1 Q. B. 865.; *Doe d. Wheeler v. Scott*, 14 L. T. 182.

⁽²⁾ *Wentworth v. Bullen*, 9 B. & C. 840; *Stockbridge v. Sussams*, 6 Jur. 437.

⁽³⁾ *Cash v. Wells*, 1 B. & Ad. 375.

⁽⁴⁾ *Codrington v. Lloyd*, 8 A. & E. 449.

⁽⁵⁾ *R. v. Sheriff of Middlesex*, 5 B. & A. 746.

⁽⁶⁾ *Bates v. Pilling*, 6 B. & C. 38.

⁽⁷⁾ *McCormack v. Melton*, 1 C. M. & R. 525.

⁽⁸⁾ *Engleheart v. Dunbar*, 2 Dowl. 202.

⁽⁹⁾ *Thorpe v. Hook*, 1 Dowl. 501.

⁽¹⁰⁾ *Arnell v. Weatherby*, 3 Dowl. 464.

⁽¹¹⁾ 8 Hen. 6, c. 12.

⁽¹²⁾ *Engleheart v. Dunbar*, *supra*.

⁽¹³⁾ *Webber v. Hutchins*, 8 M. & W. 319; *Brooks v. Hodson*, 8 Sc. N. R. 223.

amendment may be made by the award of execution on the roll,⁽¹⁾ or by the record of the judgment.⁽²⁾ The court will also allow the indorsement to be amended if, by mistake, it has been indorsed to levy too large a sum, unless the defendant has suffered by the mistake.⁽³⁾

Restitution where judgment set aside.—If after execution the judgment is set aside or reversed, the party against whom it has issued is entitled, if a term or goods have been seized under a *fi. fa.*, to have the same restored, or if they have been sold, to have the money for which they were sold;⁽⁴⁾ if lands were extended, or chattels delivered to the party under an *elegit*, then he is entitled to the lands or chattels, and not merely the extended value.⁽⁵⁾ Where restitution of the sums paid by defendant is awarded the plaintiff is bound to repay defendant only what has been properly paid by him.⁽⁶⁾

Fraudulent execution.—The court will not in general interfere summarily, to compel the sheriff, in the case of a fraudulent execution, to pay over the proceeds to the *bond fide* creditor, but leaves the question of fraud to a jury; but in a clear case it might, it appears, interfere summarily.⁽⁷⁾

III. OF THE RETURN OF WRITS, AND ATTACHMENT FOR NOT RETURNING.

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|---------------------------|--|---|
| 1. Of the rule to return. | | 3. Of the attachment for not returning. |
| 2. Of the return. | | |

1. *Of the Rule to Return.*

Rule to return writ.—It is not usual for the sheriff to return writs of execution unless ruled to do so.⁽⁸⁾ He may be ruled to return the writ not only by the plaintiff, but also by the defendant, if he show special grounds for it.⁽⁹⁾

⁽¹⁾ *Atkinson v. Newton*, 2 B. & P. 336.

⁽²⁾ *Thorpe v. Hook*, 1 Dowl. 501.

⁽³⁾ *Laroche v. Warbrough*, 2 T. R. 737; *McCormack v. Melton*, 1 A. & E. 331.

⁽⁴⁾ 2 Roll. Abr. 491; 8 Co. 19, 143; *Eyre v. Woodfine*, Cro. Eliz. 278.

⁽⁵⁾ Roll. Abr. 778; *Goodyere v. Ince*, Cro. Jac. 246.

⁽⁶⁾ *Whalley v. Barnett*, 2 Dowl. 33.

⁽⁷⁾ *Barber v. Mitchell*, 2 Dowl. 574; *Imray v. Magnay*, 11 M. & W. 276.

⁽⁸⁾ *Wata. Sheriff*, 81, 2nd edit.

⁽⁹⁾ *Williams v. Webb*, 2 Dowl. N. S. 904; *Daniels v. Gompertz*, 3 Q. B. 322.

With respect to the rule itself, which is a side-bar rule, it is provided by Rule Pr. 130, H. T. 1853, that "all rules upon the sheriffs of London and Middlesex to return writs, or to bring in the bodies of defendants, shall be four-day rules, and upon other sheriffs eight-day rules." And by r. 131, "when the rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall be open, and the officer with whom it is filed shall indorse the day and hour when it was filed." Formerly in vacation a party might obtain a judge's order instead of the rule, but now by the 132nd of the above rules, "no judge's order shall issue for the return of any writ, or to bring in the body of a defendant, but a side-bar rule shall issue for that purpose in vacation as in term, which shall be of the same force and effect as side-bar rules made for that purpose in term." The court or a judge may enlarge the time limited by the rule for making the return.⁽¹⁾ The costs of the rule in general fall upon the party obtaining it,⁽²⁾ but if the rule be not obeyed they in general eventually fall on the sheriff. A copy of the rule indorsed with the name of the officer by whom the writ was executed must be served personally on the sheriff, or his under-sheriff or deputy,⁽³⁾ and the original rule shown, if demanded.⁽⁴⁾

When sheriff cannot be ruled to return.]—There are cases in which the sheriff cannot be ruled to return the writ, as where it has been executed by a special bailiff appointed by the plaintiff or his agent; ⁽⁵⁾ where there has been collusion between the sheriff's officer and the plaintiff, or his attorney; ⁽⁶⁾ where the action, or the execution of the writ has been compromised; ⁽⁷⁾ or where the writ is a nullity; ⁽⁸⁾ but if only irregular it appears he must return it; ⁽⁹⁾ nor will the sheriff be ruled to return a *ca. sa.*, if the defendant has become a bankrupt, and the plaintiff consents to become

⁽¹⁾ *Jones v. Robinson*, 2 Dowl. N. S. 1044.

⁽²⁾ *Hutchinson v. Humbert*, 8 M. & W. 638.

⁽³⁾ *Cave v. Price*, Barnes, 30.

⁽⁴⁾ *Branard v. Berger*, 1 New R. 121; Rule Pr. 163, H. T. 1853.

⁽⁵⁾ *Palister v. Palister*, 1 Chit. R. 614 n.; *Hamilton v. Dalziel*, 2 Bl. R. 952.

⁽⁶⁾ *Ruston v. Hatfield*, 3 B. & Ald. 204.

⁽⁷⁾ *Hodges v. Jordan*, 5 Dowl. 6.

⁽⁸⁾ *Brown v. M'Millan*, 7 M. & W. 198.

⁽⁹⁾ *Jones v. Williams*, 8 M. & W. 357.

his assignee.⁽¹⁾ Further, the sheriff is not liable to be called upon to make a return to any writ or process, unless required to do so, by rule of court, within six months after the expiration of his office.⁽²⁾ These months are lunar months, and the day upon which the sheriff quits his office is reckoned inclusive.⁽³⁾ If improperly ruled to return, the sheriff should, it seems, move to set the rule aside.⁽⁴⁾

Form of rule.]—The following is the form of the rule :—
In the Q. B., [“C. P.” or “Exch. of P.”]

On , in term, Victoria.
B. } It is ordered that the sheriffs [or “late sheriffs”] of
v. } London shall within four days next after notice of this rule
D. } to be given to their secondaries [or, “that the sheriff,” (or
“late sheriff,”) of the county of shall within four days, (if in
Middlesex, or “eight days,” if in any other county) next after notice
of this rule to be given to his under-sheriff,] peremptorily return the
writ of *feri facias* issued between the parties.

Side Bar. [Q. B. or Exch.]—“In the Treasury Chamber, at the instance of the plaintiff,” in the C. P.]

By the Court.

2. Of the Return.

Return, how made.]—The return is made on the back of the writ; but if long, a schedule, referred to in the indorsement, is annexed.⁽⁵⁾ It must be certain,⁽⁶⁾ and must answer the whole writ,⁽⁷⁾ up to the period when it is made.⁽⁸⁾ The sheriff must sign the return with his christian name and surname,⁽⁹⁾ and if there are two sheriffs both must put their names, or it is no return at all.⁽¹⁰⁾ Any defect in the formal part of the return will be cured by the words “in manner and form as I am within commanded.”⁽¹¹⁾ Writs executed in counties palatine are returned by the sheriff of the county in the same way as by the sheriffs of other counties.⁽¹²⁾ When the bailiff of a liberty has the execution

(1) *Hepworth v. Sanderson*, 8 Bing. 19.

(2) 20 Geo. 2, c. 37, s. 2; *Yaroth v. Hopkins*, 3 Dowl. 711.

(3) *R. v. Alderley*, Dougl. 463.

(4) *De Moranda v. Dunkin*. 4 T. R. 119.

(5) Chit. Arch. 555, 8th edit.

(6) *Reynolds v. Barford*, 2 D. & L. 327.

(7) *R. v. Sheriff of Middlesex*, 1 Marsh. 344.

(8) *Perkins v. Meacher*, 1 Dowl. 21.

(9) *Dive v. Manningham*, Plowd. 63; 12 Edw. 2, c. 5.

(10) *Lamb v. Wiseman*, Hob. 70.

(11) Wats. Sheriff, 88, 2nd edit.

(12) C. L. P. Act, 1852. s. 122.

and return of a writ, the sheriff may return that he commanded the bailiff to execute the writ; and if the bailiff has not made a return the sheriff should return that fact accordingly, and if he has made a return the sheriff should return it.⁽¹⁾ When made on the back of the writ the return is in this form, "By virtue of this writ to me directed and delivered I have [*here is stated what has been done under the writ*] as by the said writ I am directed and commanded," "A. B., Esquire, Sheriff." When the return is long it is made in this form: "The execution of this writ appears in a certain schedule hereto annexed, A. B., Esquire, Sheriff," and a separate piece of paper containing the inquisition is annexed to the writ.⁽²⁾

Against whom conclusive.]—The return is conclusive between the same parties in the same action, but not against other parties in another action.⁽³⁾ The sheriff is in general concluded by his return,⁽⁴⁾ but not his officer.⁽⁵⁾ And if the return be false, the party who is injured by it may maintain an action against the sheriff.⁽⁶⁾

When amended.]—The return may in general be amended, in some cases even after execution,⁽⁷⁾ and though the sheriff be not a party to the application.⁽⁸⁾ The court in one case refused to allow an amendment in the return to a writ of *fi. fa.*, after they had quashed the return to the writ of *renditioni exponas* upon motion,⁽⁹⁾ and in another case after time to plead had been obtained in an action against the sheriff for a false return.⁽¹⁰⁾

3. Of the Attachment for not Returning.

In what cases issued.]—If the sheriff, having been duly

⁽¹⁾ *Boothman v. Earl of Surrey*, 2 T. R. 5; Roll. Abr. "Return," (M.) 2, 3.

⁽²⁾ The forms of returns are the same as when Dalton wrote, except that they are in English instead of Latin; Wats. Sheriff, 88, 2nd edit.

⁽³⁾ *Gibson v. Brooke*, Cro. Eliz. 859; *Leonard v. Simpson*, 2 Bing. N. C. 176.

⁽⁴⁾ *Field v. Smith*, 2 M & W. 388.

⁽⁵⁾ *Parker v. Moss*, Cro. Eliz. 181.

⁽⁶⁾ Vin. Abr. "Return," O. 47.

⁽⁷⁾ *R. v. Sheriff of Monmouth*, 1 Marsh. 344.

⁽⁸⁾ *Green v. Glasbrooke*, 2 Bing. N. C. 143; *Thorpe v. Hooke*, 1 Dowl. 494.

⁽⁹⁾ *Rowe v. Tapp*, 9 Price, 317.

⁽¹⁰⁾ *Wylie v. Pearson*, 1 Dowl. N. S. 807.

served with the rule for the return of the writ, does not make the return within the time limited by the rule he will be in contempt, and subject to an attachment;⁽¹⁾ and he will, it appears, be so subject if the return he makes be on the face of it insufficient;⁽²⁾ but not if it be good on the face of it, but false;⁽³⁾ and if it be only informal the court will in general allow it to be amended, and set aside the attachment on the sheriff paying the costs.⁽⁴⁾ Where it did not appear what damage had been sustained by the creditor, the court ordered the attachment to stand over, and left the plaintiff to bring his action against the sheriff.⁽⁵⁾ It is no answer to a rule for an attachment that the plaintiff, after the sheriff's default and before moving for the attachment, desired him to proceed with the execution.⁽⁶⁾ Where the writ was lost, of which fact the plaintiff had notice, and that the defendant was in custody, the court set aside an attachment for not returning it.⁽⁷⁾ By Reg. Gen. Pr. H. T. 1853, r. 133, "in case a rule shall issue in vacation for the return of any writ of *capias*, *ca. sa.*, *fi. fa.*, *elegit*, *habere facias possessionem*, *venditioni exponas*, or other writ of execution, and such rule shall have been duly served, but obedience shall not have been paid thereto, an attachment shall issue for disobedience of such rule, whether the thing required by such rule shall or shall not have been done in the mean time." But if the writ is ordered to be returned in term and is returned before the application for the attachment, the attachment will, it appears, be refused.⁽⁸⁾

Motion for attachment.]—The rule for the attachment is absolute in the first instance.⁽⁹⁾ It is moved for on an affidavit stating a personal service on the sheriff or under-sheriff, or one of the clerks in his office,⁽¹⁰⁾ of a copy of the rule to return the writ, and that such rule was at the same time shown to the person served,⁽¹¹⁾ and that a search has

(1) *Alchin v. Wells*, 5 T. R. 470.

(2) *Wilton v. Chambers*, 1 M. & W. 582.

(3) *Goubot v. De Grouy*, 2 Dowl. 86.

(4) *Rex v. Sheriff of Kent*, 2 M. & W. 316.

(5) *Arden v. Goodacre*, 11 C. B. 366.

(6) *Howitt v. Rickaby*, 9 M. & W. 52.

(7) *Rex v. Sheriff of Kent*, 1 Marsh. 289.

(8) *Williamson v. Harrison*, 9 M. & W. 225.

(9) Reg. Gen. H. T. 1853, (Pr.) r. 168.

(10) *Harmer v. Tilt*, 2 Marsh. 251.

(11) Reg. Gen. H. T. 1853, (Pr.) r. 163; *Barnard v. Berger*, 1 New R. 121.

been made for the writ and that it has not been returned. If the motion be for an insufficient return, a copy of the return should be annexed to the affidavit, which must verify it.⁽¹⁾

Direction of attachment.—The attachment is directed to the coroner, or, if he be the defendant, to elisors,⁽²⁾ or, if against the late sheriff, it is directed to the present sheriff.

Form of attachment.—The following is the form of an attachment:—

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the coroner of the county of _____, greeting: We command you that you [*if in the Exchequer say, "omit not by reason of any liberty in your bailiwick, but that you enter the same and"*] attach S. S., Esquire, sheriff of our said county, so that you may have him before us [*or if in the Common Pleas, "before our justices," or if in the Exchequer, "before the barons of our Exchequer"*] at Westminster on _____, to answer to us for certain trespasses and contempts by him lately done and committed in our court before us, [*if in the Common Pleas, "of and concerning those things which on our behalf shall then and there be objected against him," if in the Exchequer, "concerning divers trespasses, contempts and offences by him lately done and committed,"*] and have there then this writ. Witness [*name of chief justice or chief baron*] at Westminster this _____ day of _____, in the _____ year of our reign.

Indorsement.

By rule of court [*if in the Exchequer say "made on the _____ day of _____"*] for not returning the writ of *fieri facias* issued in a certain cause wherein A. B. is plaintiff and C. D. is defendant, pursuant to a rule of court [*if in the Exchequer add "made in the said cause for that purpose," if in the Queen's Bench or Common Pleas add "with costs of attachment."*]

Setting aside attachment.—If there be any irregularity in the proceedings against the sheriff the court will set them aside with costs, and, even although they be regular, if no injury has been sustained by the plaintiff by the sheriff's neglect, the court will set aside an attachment against him on payment of costs and making the return.⁽³⁾

(1) *Wilton v. Chambers*, 1 Har. & W. 582.

(2) *R. v. Sheriff of Glamorganshire*, 1 Dowl. N. S. 30.

(3) *R. v. Sheriff of Essex*, 8 Dowl. 363; *Reg. v. Sheriff of Herts.* 9 Dowl. 916.

CHAPTER XXVIII.

ATTACHMENT OF DEBTS DUE TO A JUDGMENT DEBTOR.

I. OF THE EXAMINATION OF THE JUDGMENT DEBTOR.

II. OF THE ORDER OF ATTACHMENT AND OF THE SUMMONS.

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|--------------------------------|-----------------------------------|
| 1. What debts may be attached. | 4. Order attaching debts. |
| 2. Debt attachment book. | 5. From what time debts attached. |
| 3. Application for attachment. | 6. Summons. |

III. PROCEEDINGS WHERE GARNISHEE ADMITS DEBT OR MAKES DEFAULT.

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| 1. Order for payment by garnishee. | 2. Forms of execution against garnishee. |
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IV. PROCEEDINGS WHERE GARNISHEE DISPUTES THE DEBT.

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|-------------------------|----------------------------|
| 1. Order for writ. | 4. Execution. |
| 2. Form of writ. | 5. Discharge of garnishee. |
| 3. Proceedings in suit. | 6. Costs. |

In addition to the means of enforcing a judgment by execution against the person, goods and lands of the judgment debtor, a new remedy is given the judgment creditor by the C. L. P.-Act, 1854, s. 60, by the attachment of debts due to the debtor from third parties. The executor of a judgment creditor is not entitled to this remedy, unless he makes himself a party to the record by suggestion or revivor.⁽¹⁾

Examination of debtor.—Before proceeding against the defendant's creditors, it may be desirable to ascertain the

(1) *Baynard v. Simmons*, 24 L. J. 253, Q. B.

precise nature of the debt it is desired to attach, or to learn what debts are owing to the defendant, and for this purpose application may be made by the judgment creditor to the court or a judge for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him before a Master of the court, or such other person as the court or judge shall appoint; and the court or judge are empowered to make such rule or order for the examination of such judgment debtor, and for the production of any books or documents; and the examination is conducted in the same manner as in the case of an oral examination of an opposite party before a Master under the C. L. P. Act, 1854.⁽¹⁾ The following is the material part of the summons, the formal part being the same as in ordinary cases:—

A. } “To show cause why he should not attend before the
 v. } Master [or other person] at _____, and submit to be
 B. } examined *viâ voce* on oath, as to the debts due and accruing
 due to him, and why on such examination he should not produce to the
 Master [or other person] all books of account, papers and writings in
 any way relating to such debts. Dated, &c.
 [Judge's signature.]

II. OF THE ORDER OF ATTACHMENT AND OF THE SUMMONS.

1. *What debts may be attached.*—It is not every debt that can be attached. Thus, a legacy, even though admitted by the executor, cannot be attached in his hands.⁽²⁾ And where the effect of attaching a debt on a bond granted by commissioners under an act of Parliament would have been to give a priority to the bondholder over the others, and they had agreed to be paid *pari passu*, it was held that the debt ought not to be attached.⁽³⁾ A mere contract to indemnify does not create a debt, and money that may have become due under it cannot be attached. This was held to be the case in *Johnson v. Diamond*,⁽⁴⁾ where a party had given the nominal plaintiff, in an action brought on his behalf, a bond conditioned to pay the defendant in such action all the costs the plaintiff might become liable to pay; costs having been

⁽¹⁾ C. L. P. Act, 1854, s. 60; the examination is conducted in the same manner as a *viâ voce* examination of witnesses under the 1 Will. 4, c. 22.

⁽²⁾ *McDowall v. Hollister*, 25 L. T. 185.

⁽³⁾ *Kennett v. The Westminster Improvement Commissioners*, 11 Exch. 349.

⁽⁴⁾ 24 L. J. 217, Exch.

taxed against the plaintiff, the court held that the amount of such costs did not constitute a debt in the hands of the obligor of the bond, and could not be attached by the defendant, the judgment creditor. A superannuation allowance granted by the East India Company to a servant of the company, under the 53 Geo. 3, c. 155, s. 93, is a gratuity and not a debt, and cannot, therefore, be attached.⁽¹⁾

2. *Debt attachment book.*—By the C. L. P. Act, 1854, s. 66, it is provided that “in each of the superior courts there shall be kept at the Master’s office a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amount recovered, and otherwise, and the mode of keeping such book shall be the same in all the courts, and copies of any entries made therein may be taken by any person upon application to any Master.”

3. *Application for attachment.*—The application for the attachment may be made either before or after the oral examination of the judgment debtor. It is made to a judge, and is *ex parte*, and upon an affidavit of the judgment creditor or his attorney, stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that some other person is indebted to the judgment debtor, and is within the jurisdiction.⁽²⁾

The following may be the form of such affidavit :—

In the Q. B. [“C. P.,” or “Exch. of P.”]

Between A. B., plaintiff, and C. D., defendant.

I, A. B. of &c., make oath and say,

1. That on the day of last I recovered a judgment of this honourable court, in this action against the above-named defendant, for the sum of £ .

2. That the said judgment is still unsatisfied to the amount of the said sum so recovered, [or “of £ , parcel of the said sum so thereby recovered.”]

3. That J. K., of , in the county of , [gentleman,] is indebted to the said C. D. in £ .⁽³⁾

4. That the said J. K. is within the jurisdiction of this honourable court.

Sworn, &c.

A. B.

(1) *Innes v. The East India Company*, 23rd January 1856, C. P.

(2) C. L. P. Act, 1854, s. 61.

(3) Orders have been made upon affidavits which did not state the amount of the debt.

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4. *Order attaching debts*].—The judge, upon the application for the attachment, may order that all debts owing or accruing from such third person (called the garnishee) to the judgment debtor shall be attached to answer the judgment debt.⁽¹⁾ It would appear that the jurisdiction of the judge to grant or refuse the order is discretionary.⁽²⁾

5. *From what time debts attached.*].—Service of the order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, binds such debts in his hands.⁽³⁾ The debt is bound in the hands of the garnishee, so that he cannot pay to his original creditor, or to any one claiming under him; but such binding is subject to the provisions of the Bankrupt Act, and the debt will pass to the assignees of the garnishee, should he become a bankrupt after the service of the order and notice given pursuant to the act, and the judgment creditor will be in the position of a creditor having a security within 12 & 13 Vict. c. 106, s. 184.⁽⁴⁾

6. *Summons.*].—Either by the order attaching the debts or any subsequent order, it may be ordered that the garnishee shall appear before the judge or a Master of the court, as such judge shall appoint, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt.⁽⁵⁾

The following form contains both the order for attachment and summons :—

Order for Attachment of Debt and Summons for Garnishee to Pay the same.

A. B., judgment creditor,
 against
C. D., judgment debtor,
E. E., garnishee.

“ Upon hearing the attorneys or agents for the judgment creditor, and upon reading the affidavit of X. Y., I do order, that all debts due, and owing, or accruing due from the above-named garnishee to the above-

⁽¹⁾ C. L. P. Act, 1854, s. 61.

⁽²⁾ *Kennett v. The Westminster Improvement Commissioners*, 11 Exch. 349.

⁽³⁾ C. L. P. Act, 1854, s. 62.

⁽⁴⁾ *Holmes v. Tutton*, 24 L. J. 346, Q. B.

⁽⁵⁾ C. L. P. Act 1854, s. 61.

named judgment debtor be attached, to answer a judgment recovered against the above-named judgment debtor, on the day of 18 , by the above-named judgment creditor, in the Court of Queen's Bench, [or Common Pleas, or Exchequer of Pleas.] I further order that the above-named garnishee, his attorney, or agent, attend me at my Chambers, in Rolls Garden, Chancery Lane, on , the day of next, at of the clock in the noon, to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or as much thereof as may be sufficient to satisfy the said judgment debt.

Dated, &c.

[Judge's signature.]

* * " See memorandum on back hereof."

There is always indorsed on the back of the summons the following

Memorandum.

17 & 18 Vict., c. 125, ss. 62, 63.

62. "Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee, in such manner as the judge shall direct, shall bind such debts in his hand."

63. "If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt."

III. PROCEEDINGS WHERE GARNISHEE ADMITS DEBT OR MAKES DEFAULT.

1. *Order for payment by garnishee.*—If the garnishee does not forthwith⁽¹⁾ pay into the court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forthwith accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt.⁽²⁾

⁽¹⁾ That is after service of the order for an attachment, and the summons.

⁽²⁾ C. L. P. Act 1854, s. 63.

Order for Payment by Garnishee.

In the matter of attachment of debt.

A. B., judgment creditor,
against
C. D., judgment debtor,
E. F. garnishee.

Upon hearing the attorney or agent for the judgment creditor and for the garnishee, and upon reading the affidavit of X. Y., and the order made herein, on the day of 18 , whereby it was ordered, [*etc., as in order for attachment,*] I do order that the said garnishee do forthwith pay the said judgment creditor the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt, and that in default thereof execution may issue for the same.

Dated, &c.

[Judge's signature.]

2. *Forms of Execution.*—The *fi. fa.* in such case must be in the following form, or as nearly as may be, such form being prescribed by the Reg. Gen. M. V. 1854, sched. 22.

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of greeting. We command you, that you omit not by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of E. F. in your bailiwick you cause to be levied £ , being the amount of [*or "part of the amount of," if the debt be more than the judgment debt*] a debt due from the said E. F. to C. D., heretofore attached in the hands of the said E. F., by an order of Sir , Knight, one of our justices of our court of Queen's Bench, [*or "one of our justices of our Court of Common Pleas," or "one of the barons of our Exchequer"*] dated , [*date of order*] pursuant to the statute in such case made, to satisfy, [*or if the debt be less than the judgment debt say, "towards satisfying"*] £ , which A. B., lately in our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas,"*] recovered against the said C. D., whereof the said C. D. is convicted, and that you have that sum of £ , before us, [*or in C. P., "before our justices," or in Exchequer, "before the barons of our Exchequer,"*] at Westminster, immediately after the execution hereof, to be rendered to the said A. B. in satisfaction as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf. And in what manner you have executed this our writ make appear to us [*or in the C. P., "to our justices," or in the Exchequer, "to the barons of our Exchequer"*] immediately after the execution hereof, and have you there then this writ.

Witness, at Westminster, the day of , A. D. .

The form of *ca. sa.* in the like case is prescribed by Reg. Gen. M. V. 1854, sched. 23, and is as follows:—

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of greeting : We command you, that you omit not, by reason of any liberty in your county, but that you enter the same, and take E. F., if he be found in your bailiwick, and him safely keep so that you may have his body before us, [*or in Common Pleas, "before our justices." or in Exchequer, "before the barons of our Exchequer,"*] at Westminster, immediately after the execution hereof, to satisfy A. B. £ , being the amount [*or "part of the amount," if the debt be more than the judgment debt*] of a debt due from the said E. F. to C. D., heretofore attached in the hands of the said E. F. by an order of Sir Knight, one of our justices of our Court of Queen's Bench [*or "one of our justices of our Court of Common Pleas," or "one of our barons of the Exchequer,"*] dated [*date of order*] pursuant to the statute in such case made and provided, to satisfy [*or "towards satisfying," if the debt be less than the judgment debt*] £ , which the said A. B. lately in our said Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas," as the case may be*] recovered against the said C. D., whereof the said C. D. is convicted, and have you there then this writ.

Witness at Westminster, the day of A. D.

IV. PROCEEDINGS WHERE GARNISHEE DISPUTES THE DEBT.

1. *Order for writ.*—If the garnishee disputes his liability, the judge, instead of making an order that execution shall issue, may order that the judgment creditor shall be at liberty to proceed against the garnishee by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, and for costs of suit.

2. *Form of writ.*—The writ must be in the following form, prescribed by the Reg. Gen. M. V. 1854, sched. 24 :—

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To E. F., greeting : We command you that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our Court of Queen's Bench [*or "Common Pleas," or "Exchequer of Pleas,"*] to show cause why A. B. should not have execution against you for £ , being the amount [*or "part of the amount," if the debt exceeds the judgment debt*] of a debt due from you to C. D., to satisfy [*or "towards satisfying," if the debt be less than the judgment debt*] £ , which, on the day of 18 , [*date of judgment*] the said A. B., by a judgment of our Court of Queen's Bench [*or*

ATTACHMENT OF DEBTS—PROCEEDINGS IN SUIT. 623

"Common Pleas," or "Exchequer of Pleas"] recovered against the said C. D., and for costs of suit in this behalf; and take notice that in default of your so doing the said A. B. may proceed to execution.

Witness at Westminster the day of , in the year of our Lord .

Indorsements.]—The following indorsements must be made on the writ :—

This writ was issued by P. A. [*plaintiff's attorney's name in full, also if sued out as agent for an attorney in the country here say, "as agent for A. B., of ,"*] attorney for the said A. B. [*or if sued out by the plaintiff in person, "this writ was issued in person by the plaintiff within named, who resides at ,"* mentioning the city, town, or parish, and also the name of the hamlet, street and number of the house of the plaintiff's residence, if any such there be.]

The plaintiff claims £ [*the amount of the debt claimed from the garnishee*] and £ for costs; and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof further proceedings will be stayed.

Within three days after the service fill up the following indorsement :—

This writ was served by me, X. Y., on C. D., on the day of 18 . X. Y.

3. Proceedings in suit.]—The proceedings in the suit are the same as nearly as may be as upon a writ of revivor issued under the C. L. P. Act, 1852,⁽¹⁾ to the practice upon which the reader is accordingly referred. But it may be observed here, with reference to the service of such writ, that by the 15 & 16 Vict. c. 76, s. 131, "it may be served in any county, and otherwise proceeded on, whether in term or vacation, in the same manner as a writ of summons, and the venue on a declaration upon such writ may be laid in any county, and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action."

Declaration on writ.]—The following is the form of declaration on a writ against a garnishee, given in schedule 25 to the Reg. Gen. M. V. 1854 :—

In the [Q. B. or "C. P." or "Exch. of Pleas."]

(*Venue.*) A. B., by The day of A.D. , his attorney [*or "in person"*] sues E. F.,

⁽¹⁾ C. L. P. Act, 1854, s. 64.

by a writ issued out of this court, in these words:—Victoria, &c. [*copy the writ*] and the said E. F. has appeared to the said writ, and the said A. B., by his attorney aforesaid, says that the said debt due from the said E. F. to the said C. D. is for, &c. [*here state as in a declaration in ordinary cases*]; and the said A. B. prays that execution may be adjudged to him accordingly for the said £ , and for costs of suit in this behalf.

Plea.—The following plea thereto is prescribed by Reg. Gen. M. V. 1854, sched. 26 :—

In the Q. B. ["C. P.," or "Exch. of P."]

E. F.	}	The said E. F. by , his attorney, says that he never
ats.		
A. B.		

was indebted to the said C. D., as alleged [*or plead such other defence or several defences as in other cases.*]

Issue.—The following is the form of issue prescribed by Reg. Gen. M. V. 1854, sched. 27 :—

[*Copy the declaration and pleadings, and conclude thus :*—Therefore let a jury come, &c.

Postea.—The *postea* is the same as in ordinary cases, omitting the assessment of damages.⁽¹⁾

4. *Execution.*—The following forms of writs of execution upon a judgment, obtained by a judgment creditor against a garnishee are given by the Reg. Gen. M. V. 1854, scheds. 30 and 31 respectively :—

Fieri Facias against Garnishee.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of , greeting : We command you omit not by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of E. F., in your bailiwick, you cause to be made £ , the amount [*or "part of the amount," if the debt be more than the judgment debt*] of a debt due from the said E. F. to C. D. to satisfy [*or "towards satisfying," if the debt be less than the judgment debt*] £ , which A. B., on the day of , 18 , [*date of judgment against judgment debtor*] by the judgment of our Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas,"*] recovered against the said C. D., and whereupon it has been adjudged by our said court that the said A. B. should have execution against the said E. F. for the said £ , and also £ , which in our same

⁽¹⁾ Reg. Gen. M. V. 1854, sched. 28.

court were adjudged to the said A. B. for his costs of suit, which he hath been put to on occasion of our writ sued out against the said E. F. at the suit of the said A. B. in that behalf, whereof the said E. F. is convicted, and have the said money before us, [*or in the Common Pleas, "before our justices, or in the Exchequer of Pleas, "before the barons of our Exchequer,"*] at Westminster, immediately after the execution hereof, to be rendered to the said A. B. And that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do on this behalf, and in what manner you shall have executed this our writ make appear to us, [*or in the Common Pleas, "to our justices," or in the Exchequer, "to the barons of our Exchequer," as the case may be,*] at Westminster, immediately after the execution hereof, and have you there this writ.

Witness , at Westminster, the day of in the year of our Lord .

Capias ad Satisfaciendum against Garnishee.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith. To the sheriff of greeting: We command you that you omit not by reason of any liberty of your county, but that you enter the same, and take E. F., if he shall be found in your bailiwick, and him safely keep, so that you may have his body before us [*or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer," as the case may be*] at Westminster, immediately after the execution hereof to satisfy A. B. £ , the amount [*or "part of the amount," if the debt be more than the judgment debt,*] of a debt due from the said E. F. to C. D., and for the levying of which it has been adjudged by our Court of Queen's Bench, [*or "Common Pleas," or "Exchequer of Pleas,"*] that the said A. B. should have the execution against the said E. F. to satisfy, [*or "towards satisfying," if the debt be less than the judgment debt*] £ , which the said A. B. on , [*the date of the judgment against the judgment debtor,*] by the judgment of the said court recovered against the said C. D., and further to satisfy the said A. B. for his costs of suit, which he has been put to on occasion of our writ sued out against the said E. F. at the suit of the said A. B. in that behalf, whereof the said E. F. is convicted, and have you there then this writ. Witness , at Westminster, the day of , in the year of our Lord .

5. *Discharge of garnishee.*]—Payment made by or execution levied upon the garnishee under any of the proceedings is a valid discharge to him as against the judgment debtor to the amount paid or levied, although such proceedings may be set aside or the judgment reversed.⁽¹⁾

6. *Costs.*]—The costs of any application for an attach-

⁽¹⁾ C. L. P. Act, 1854, s. 65.

ment of debt under this act, and of any proceedings arising from or incidental to such application, is in the discretion of the court or a judge.⁽¹⁾ If no order be made the successful party is entitled to his costs as in ordinary cases.⁽²⁾

⁽¹⁾ C. L. P. Act, 1854, s. 67.

⁽²⁾ *Johnson v. Diamond*, 25 L. J. 40, Exch.

CHAPTER XXIX.

ENTRY OF SATISFACTION ON THE ROLL.

WHENEVER judgment has been satisfied, whether by payment or execution, or by a release after the debtor was taken on a *ca. sa.*,⁽¹⁾ the defendant is entitled to have satisfaction entered on the roll. It is sometimes difficult to determine what amounts to satisfaction, as where the defendant has been taken on a *ca. sa.*, and discharged by the plaintiff's attorney on an understanding as to paying the debt, but without the plaintiff's assent.⁽²⁾ The court has ordered satisfaction to be entered where the defendant, in trover for title deeds, offered to deliver up the deeds and pay costs as between attorney and client, and place the plaintiff in the same situation otherwise, as before.⁽³⁾ So where the defendant offered to set off the amount of the judgment debt *pro tanto* against another larger judgment obtained against the plaintiff in another court.⁽⁴⁾ But where a judgment was obtained for 500*l.*, and the judgment creditor lent the defendant 570*l.* more, the judgment to stand as security for payment, the court refused to order satisfaction to be entered on payment of the 500*l.* only.⁽⁵⁾ So the court refused to order the lessor of the plaintiff in ejectment to tax his costs within a certain time, to allow satisfaction to be entered.⁽⁶⁾ Before satisfaction can be entered, the roll must be carried in ; as to which see *ante*, p. 509.

“ In order to acknowledge satisfaction of a judgment, it shall be requisite only to produce a satisfaction-piece in form

(1) *Lambert v. Parnell*, 15 L. J. 55, Q. B.

(2) *Ward v. Broomhead*, 7 Ex. 726.

(3) *Coombe v. Sansom*, 1 D. & R. 201.

(4) *Simpson v. Hanley*, 1 M. & Sel. 696.

(5) *Crafts v. Wilkinson*, 4 Q. B. 74.

(6) *Doe v. Fillite*, 11 M. & W. 80.

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as hereinafter mentioned, and such satisfaction-piece shall be signed by the party or parties acknowledging the same, or their personal representatives; and such signature or signatures shall be witnessed by a practising attorney of one of the courts at Westminster expressly named by him or them, and attending at his or their request to inform him or them of the nature and effect of such satisfaction-piece before the same is signed, and which attorney shall declare himself in the attestation thereto to be the attorney for the person or persons so signing the same, and state he is witness as such attorney; provided that a judge at chambers may make an order dispensing with such signature under special circumstances if he thinks fit, and in cases where the satisfaction-piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the Master may direct." The above rule (Rule Pr. 80, H. T. 1853) gives the following as the

Form of Satisfaction-piece.

In the

_____ Monday, the _____ day of _____, A. D. 18 _____,
 to wit. { Satisfaction is acknowledged between _____, plaintiff, and
 _____, defendant, in an action _____, for _____ and _____.
 And _____ do hereby expressly nominate and appoint _____, attorney
 at law, to witness and attest _____ execution of this acknowledgment
 of satisfaction.

Judgment entered on the _____ day of _____, in the
 year of our Lord 18 _____ Roll No. _____.

Signed by the said _____, in the presence of me, of _____, one of the attorneys of the Court of _____, at Westminster. And I hereby declare myself to be attorney for and on behalf of _____, the said _____, expressly named by him, and attending at his re- quest to inform him of the nature and effect of this acknowledgment of satisfaction, (which I accordingly did before the same was signed by him). And I also declare that I subscribe my name hereto as such attorney.	}	(Signature.) _____ the above- named plaintiff. (Date.)
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The satisfaction-piece is written on parchment in the above form, and signed and attested as directed; it is then taken to the clerk of the judgments (in the Queen's Bench it must be first marked at the Treasury office), who will enter the satisfaction on the roll.

Dispensing with signature.—A judge at chambers may by his order dispense with the signature in special circumstances; but he will require clear proof of the satisfaction. Thus, where the plaintiff was abroad, an affidavit of the

sheriff's officer, that he had levied the amount, is not enough, without an affidavit of the plaintiff's attorney to the same effect.⁽¹⁾ And where the plaintiff was dead, and no administration had been taken out, an affidavit of the defendant's attorney, that the plaintiff had been paid in full satisfaction, was held not enough.⁽²⁾ So where four out of five plaintiffs consented, but the fifth was abroad and could not be found, the application was refused.⁽³⁾

Form of Entry of Satisfaction on Roll.

Afterwards, on , in the year of our Lord , comes here the said A. B. by P. A. his attorney, in this behalf, and acknowledgeth himself to be satisfied by the said C. D. of the damages and costs aforesaid. Therefore let the said C. D. be thereof acquitted.

⁽¹⁾ *De Bastos v. Willmott*, 1 Hodg. 15.

⁽²⁾ *Speech v. Slade*, 8 Moore, 461.

⁽³⁾ *Davis v. Jones*, 5 Dowl. 503.

BOOK II

VARIATIONS IN AN ACTION ARISING FROM THE
CHARACTER AND SITUATION OF THE PARTIES AND
THE NATURE OF THE ACTION.

CHAPTER I.

PAUPERS.

In what cases.—Where a party is too poor to pay the fees of court, or of his attorney and counsel, he may be admitted to sue *in formâ pauperis*. The courts exercise this discretionary power at common law as well as under statute; ⁽¹⁾ but seldom in favour of defendants,⁽²⁾ except in revenue and criminal cases.⁽³⁾ An infant may be allowed to sue by a *prochein amy* and *in formâ pauperis*, and one motion may be made for both objects.⁽⁴⁾ It seems the court will not allow the plaintiff to sue as a pauper in actions for penalties; ⁽⁵⁾ and perhaps not in actions for slander; ⁽⁶⁾ nor if he sues as executor or administrator.⁽⁷⁾ The test of

(1) *Brunt v. Wardle*, 3 M. & Gr. 534; 4 Sc. N. R. 188; 1 Dowl. N. S. 229; 11 Hen. 7, c. 12, which enacts, "that every poor person having cause of action against any person shall have, by the discretion of the Chancellor of the Realm, writs original, &c., therefore nothing paying for the seals of the same; and that the said Chancellor shall assign such of the clerks, &c., to write the same ready to be sealed, and also learned counsel and attorneys for the same without any reward taking therefore." The 23 Hen. 8, c. 15, which first gave costs to defendants, exempts pauper plaintiffs from being liable to pay these.

(2) *Anon. Barnes*, 328; but see Vin. Abr. "Pauper," B. 7.

(3) *Attorney General v. Dummie*, 2 Cr. & M. 393; *R. v. Page*, 1 Dowl. 507; *Ibid.* 536.

(4) *Bryant v. Wayner*, 7 Dowl. 676.

(5) *Hawes v. Johnson*, 1 Y. & J. 10.

(6) Vin. Abr. "Pauper," B. 2.

(7) *Paradice v. Sheppard*, 1 Dick. 136; *Oldfield v. Cobbett*, 1 Phil. 613.

poverty is, that the plaintiff be not worth 5*l.* beyond his wearing apparel and the subject-matter of the suit.⁽¹⁾ "No person shall be admitted to sue in *formâ pauperis*, unless the case laid before counsel for his opinion, and his opinion thereon, with an affidavit of the party or his attorney, that the same case contains a full and true statement of all the material facts to the best of his knowledge and belief, shall be produced before the court or judge to whom application may be made; and no fees shall be payable by a pauper to his counsel and attorney, nor at the offices of the Master, or Associates, or at the judge's chambers, or elsewhere, by reason of a verdict being found for such pauper, exceeding five pounds."⁽²⁾ The following is a

Form of Affidavit to sue in Formâ Pauperis.

In the Q. B. ["C. P." or "Exch. of Pleas."]

Between A. B., plaintiff,
and

C. D., defendant.

I, A. B., of _____, labourer, (2) the above-named plaintiff [or, if *action not commenced*, omit the title of the cause and alter accordingly], make oath and say, that I am not worth five pounds in the world, save and except my wearing apparel, and the matter in question in this case [or "relating to the matter in dispute between me and C. D., in respect of which I am desirous of bringing an action *in forma pauperis* against the said C. D.,"] and I further say that the paper writing annexed, marked A., contains a full and true statement of all the material facts relating to the said cause, to the best of my knowledge and belief, and the opinion of P. Q. Esq., barrister-at-law, thereupon, signed by him, on the _____ day of _____, A. D. _____.

Sworn, &c. _____ A. B.

When.]—The application may be made either before the action is commenced, or during the pendency thereof; (¹) but, if during the action, the order or rule will not have a retrospective operation, (²) and the defendant may apply for security to be given for the costs already incurred, though he

(1) Todd, 98; R. H. 3 & 4 Jac. 2 r. 1 a.

(7) Rule Pr. 121, H. T. 1853.

(³) It is an irregularity to omit the addition of the plaintiff. *Seymour v. Maddox*, 1 L. M. & P. 543.

(4) *Doe d. Evans v. Owens*, 9 M. & W. 455; 1 Dowl. N. S. 404;
Casey v. Tomlin, 7 M. & W. 189; 8 Dowl. 892.

(¹) *Doe d. Ellis v. Owens*, 10 M. & W. 514; 2 Dowl. N. S. 426;
Pitcher v. Roberts, 2 Dowl. N. S. 394.

must apply early.⁽¹⁾ If a new trial has been ordered, it is not too late then to apply.⁽²⁾

How.—The application may be either by motion in open court, or by way of petition to the chief of the court. Part of the application is to have counsel and attorney (naming them) assigned to the plaintiff. If the motion is made in court, the affidavit, together with the case submitted to counsel, and his opinion thereon, must be produced. The petition to the chief of the court may be as follows:—

Form of Petition to the Chief Justice, &c., to be admitted to Sue.

In the Q. B. ["C. P." or "Exch. of Pleas."]

Between A. B., plaintiff,
and

C. D. defendant.

To the Right Hon. [*name of the chief*] Lord Chief Justice of Her Majesty's Court of Queen's Bench, [*or "of Her Majesty's Court of the Bench," or "Lord Chief Baron of Her Majesty's Court of Exchequer, at Westminster, and the rest of the barons of the said court."*]

The humble petition of A. B., of , labourer,
Sheweth,

That [*here state cause of action against C. D., of &c.*] and your petitioner is desirous of commencing an action against the said C. D. for the same, but is unable to commence [*or "has commenced an action, &c., but is unable to carry on"*] such action on account of his poverty, as appears by the affidavit annexed hereunto.

Your petitioner, therefore, most humbly prays your lordship, [*or in Exchequer, "your honours,"*] that he may be admitted to prosecute his said action *in formâ pauperis*, and that P. C. Esq. may be assigned to him as his counsel, and P. A., gentleman, as his attorney to prosecute the said action.

And your petitioner will ever pray, &c.

A. B.

The petition should be taken with the affidavit, and case for opinion of counsel with the opinion thereon, to the chambers of the chief justice, or baron, and his clerk will make out the order. If the motion is made in court, the rule is absolute in the first instance,⁽³⁾ and need not be drawn up on reading counsel's opinion.⁽⁴⁾ A copy of

⁽¹⁾ *Jones v. Peers*, McCl. & Y. 282.

⁽²⁾ *Hall v. Ives*, 2 D. & L. 610.

⁽³⁾ *Hall v. Ives*, 8 Scott N. R. 715.

⁽⁴⁾ *Bryant v. Wayner*, 7 Dowl. 676.

the rule should be annexed to the declaration or next document delivered in the cause, and the original must be shown to the officer in the various stages where fees of court are payable.

Costs.]—"A person admitted to sue *in formd pauperis* shall not in any case be entitled to costs from the opposite party, unless by order of the court or a judge,"⁽¹⁾ that is to say, when the plaintiff obtains a verdict, whether above or under 5*l.*, he requires the order of the court or a judge to enable him to recover anything, and even then he can only recover from the defendant such costs as he has paid, or become liable to pay; but these do not in any case include a remuneration to his counsel or attorney.⁽²⁾ And he cannot have the costs of his witnesses allowed, where he has not actually paid these.⁽³⁾ And where he succeeds on some issues, and fails on others, he is entitled, if at all, only to the costs of such parts of the briefs, and such witnesses as were necessary for the issues on which he succeeded.⁽⁴⁾ The costs would include the attorney's payments to the law stationer for parchment and paper, though, it seems, not for copying.⁽⁵⁾

On the other hand the plaintiff is not obliged to pay costs, whether interlocutory or final,⁽⁶⁾ to the defendant, incurred during the time the order was in force;⁽⁷⁾ though it is different as to the costs incurred prior to the order. Thus where, money having been paid into court before the order was obtained, defendant had obtained a verdict, the court ordered the money in court to be paid out to defendant, in satisfaction of the antecedent costs.⁽⁸⁾ And the defendant cannot have his costs of issues set off against the plaintiff's costs of issues,⁽⁹⁾ though the costs of a former action, in which the pauper was a defendant and unsuccessful, may be set off against those of an action in which he sues as a pauper and succeeds, provided the pauper plaintiff's attorney has no lien on the costs for moneys advanced.⁽¹⁰⁾

⁽¹⁾ Rule Pl. 28, T. T. 1853.

⁽²⁾ *Dooley v. Great Northern Railway Company*, 4 E. & B. 341; Rule Pr. 121, H. T. 1853, *ante*, p. 631.

⁽³⁾ *Freeman v. Koshier*, 6 D. & L. 517.

⁽⁴⁾ *Gougenheim v. Lane*, 1 M. & W. 136; 4 Dowl. 482.

⁽⁵⁾ *Holmes v. Penny*, 9 Ex. 584.

⁽⁶⁾ *Pratt v. Delarue*, 10 M. & W. 509; 2 Dowl. N. S. 322.

⁽⁷⁾ 23 Hen. 8, c. 15, s. 2; *Blood v. Lee*, 3 Wils. 24.

⁽⁸⁾ *Casey v. Tomlin*, 7 M. & W. 189; 8 Dowl. 892.

⁽⁹⁾ *Foss v. Racine*, 4 M. & W. 610; 7 Dowl. 203.

⁽¹⁰⁾ *O'Hare v. Reeves*, 13 Q. B. 659.

A pauper plaintiff is in the same position as other plaintiffs when deprived of costs under the County Courts Acts, for he may sue in those courts as a pauper.⁽¹⁾ When he is allowed to amend, he cannot insist as a matter of right upon doing so, without payment of costs.⁽²⁾

Dispaupering plaintiff and compelling him to pay costs.—Where the plaintiff acts vexatiously, or seems to have no good cause of action, the proper course is to dispauper him, which is done by making the judge's order a rule of court, and then moving to discharge it.⁽³⁾ Thus, where he withdrew the record, on the ground of its requiring amendment, he was dispaupered for acting vexatiously, for he might have applied to the judge at the trial to amend.⁽⁴⁾ But though he may be liable to pay the costs of the day, if this arose from mere accident, the court will not dispauper him merely on that ground.⁽⁵⁾ The dispaupering of a plaintiff has no retrospective effect, and he is liable only for costs subsequently incurred.⁽⁶⁾ "Where a pauper omits to proceed to trial pursuant to notice, he may be called upon by a rule to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs shall be paid."⁽⁷⁾ Or if he has conducted himself vexatiously, he may be called on by the same rule to pay the costs of the day, and be dispaupered.⁽⁸⁾ The pauper does not incur costs within the above rule of court, if he duly countermand notice of trial;⁽⁹⁾ but he does so by withdrawing the record, because it required amendment,⁽¹⁰⁾ or because the venue was wrongly laid.⁽¹¹⁾ So he incurs these costs, when his attorney's clerk had by mistake not entered the record, and the cause could not be tried.⁽¹²⁾ And the privilege of exemption from costs does not apply to collateral proceedings; thus where, having been obliged to pay the costs of the day, incurred as he alleged by his attor-

(1) *Chinn v. Bullen*, 8 C. B. 447.

(2) *Foster v. Bank of England*, 2 D. & L. 790; 6 Q. B. 878.

(3) *Hawes v. Johnson*, 1 Y. & J. 10.

(4) *Facer v. French*, 5 Dowl. 554.

(5) *Hodges v. Toplis*, 2 C. B. 921; 3 D. & L. 786.

(6) *Pratt v. Delarue*, 10 M. & W. 512.

(7) Rule Pr. 122, H. T. 1853.

(8) *Bedwell v. Coulsting*, 3 D. & L. 767.

(9) *Doe d. Pugh v. Price*, 1 Bail C. R. 311.

(10) *Facer v. French*, 5 Dowl. 554; *Gore v. Morphew*, 8 Dowl. 137; *Doe Lindsay v. Edwards*, 2 Dowl. 471.

(11) *Thompson v. Hornby*, 9 Q. B. 978.

(12) *Hodges v. Toplis*, 2 C. B. 921 3 D. & L. 786

ney's negligence, he obtained a rule calling on his attorney to repay him, which rule was discharged, he was held not exempted from paying the costs of the rule.⁽¹⁾

Where the plaintiff in an action for slander, to which a justification was pleaded, was nonsuited on the merits, and brought a second action *in formâ pauperis* for the same cause of action, without paying the costs of the first, the court stayed the proceedings till the costs should be paid.⁽²⁾

⁽¹⁾ *Bell v. Port of London Assurance Company*, 1 L. M. & P. 691.

⁽²⁾ *Hoare v. Dickson*, 6 D. & L. 577; *Haigh v. Paris*, 4 D. & L. 325; *Weston v. Withers*, 2 T. R. 512; *Hullock on Costs*.

CHAPTER II.

INFANTS.

1. *Plaintiffs.*

AN infant cannot sue in person, nor has he power to appoint an attorney to sue in his name, and the defendant may plead in abatement on that ground ; ⁽¹⁾ but the court will appoint a *prochein amy* or guardian for the purpose. ⁽²⁾ If there is a legal guardian, he is generally appointed ; but if he cannot act, then any other person with his consent may do so. ⁽³⁾ No authority to the *prochein amy* from the infant to sue is necessary, though the infant be on the very eve of majority ; but if there was fraud, the court might interfere. ⁽⁴⁾ The appointment is generally made before the writ of summons is issued, and is obtained by the person, who is to act as guardian or *prochein amy*, going with the infant before a judge at chambers, who, if in the Common Pleas, will grant an order for admission, or in the Queen's Bench or Exchequer will grant his fiat for a rule, which may be drawn up on taking the fiat to the Master of the court. Or if the *prochein amy* cannot attend, the order of admission or rule may be obtained from a judge at chambers on production of a petition to the court in the name of the infant, with a consent to act signed at the foot thereof by the *prochein amy*, and an affidavit, verifying the signature, thus :—

⁽¹⁾ 2 Saund. 212 a (5).

⁽²⁾ 3 Ed. 1, c. 48 ; 13 Ed. 1, c. 15 ; Cro. Car. 161 ; Fitzh. N. B. 27 J. ; 2 Inst. 261 ; Roll. Abr. 287, 288.

⁽³⁾ *Claridge v. Crawford*. 1 D. & R. 13.

⁽⁴⁾ *Morgan v. Thorne*, 7 M. & W. 400 : 9 Dowl. 228.

Form of Petition to sue by Prochein Amy.

[*State title of court, and cause,*⁽¹⁾ *and address of petition, as ante, p. 632.*]

The humble petition of A. B., the plaintiff in this suit, an infant under the age of twenty-one years,

Showeth,

That your petitioner has, as he is advised, a good cause of action against the said C. D., for [*state cause of action, as in the forms, ante, p. 131*] and that your petitioner is about to commence an action against the said C. D. in this honourable court, for the same, but as your petitioner is an infant under the age of twenty-one years, to wit, of the age of years:

Your petitioner therefore humbly prays your lordship, [*or in Exchequer, "your honours,"*] to admit him to prosecute the said action by P. F., your petitioner's next friend.

And your petitioner will ever pray, &c.

A. B.⁽²⁾ [*or, A. B., signed by me for him, (or her) being his next friend.*]

Witness, W. P.

P. F.]

Form of Consent of Prochein Amy.

I hereby consent and agree that the above-named A. B. shall be at liberty to prosecute this action by me, as his next friend, according to the prayer of the above petition. Witness my hand, this day of , 18 .

P. F.

Witness, W. P.

Form of Affidavit verifying Signatures.

[*Title of court and cause.*]

I, W. P., of , make oath and say that A. B., the above-named plaintiff did on, &c., duly sign the petition hereunto annexed, marked A. in my presence, [*or state that the prochein amy signed it, the infant being unable to do so, stating why. See n. 2*] and I further say that at the same time I was present, and did see P. F., the person mentioned in the prayer of the said petition, duly sign the consent of agreement thereunder written as the next friend of the said A. B.

Sworn, &c.

W. P.

"A special admission of *prochein amy* or guardian to prosecute or defend for an infant shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified."⁽³⁾

⁽¹⁾ The cause is intituled solely in the infant's name as plaintiff.

⁽²⁾ It seems the *prochein amy* may sign the petition in the name of the infant: *Morgan v. Thorne*, 7 M. & W. 408. But in such a case perhaps the affidavit should state the reason why the infant cannot sign, as in *Eades v. Booth*, 8 Q. B. 718; 3 D. & L. 770.

⁽³⁾ Rule Pr. 5 H. T. 1853.

Declaration.—A copy of the order of admission or rule of court is annexed to and delivered with the declaration ;⁽¹⁾ and the fact ought also to be alleged in the declaration.

Form of Declaration.

——— } A. B. by P. F., who is admitted by the Court of Our Lady
to wit. } the Queen before the Queen herself, [or, "by the justices,"
or "by the barons,"] here as the next friend of the said A. B. who
is an infant under the age of 21 years, to prosecute for the said A. B.
in this behalf, complains, &c.

Change of prochein amy.—As the *prochein amy* is appointed by, and is an officer of the court, if the infant wishes to remove him, he must apply to the court for that purpose ; and an entry of the change should be made on the record.⁽²⁾ But on the plaintiff coming of age, he may, it seems, remove the *prochein amy* of his own authority, and appear thereafter by his own attorney.⁽³⁾

Security for costs.—The plaintiff's attorney may be compelled to disclose the place of residence of the *prochein amy* or guardian,⁽⁴⁾ and the proper course for that purpose is to apply at chambers for a stay of proceedings until the address is given.⁽⁵⁾ But the mere fact of the *prochein amy* not being found at the address given by his attorney is no ground for calling for security.⁽⁶⁾ The court will order the *prochein amy* to give security for costs, if it is sworn that he is insolvent.⁽⁷⁾ It is also a good ground for applying to a judge to revoke the appointment, and stay the proceedings, until a responsible person is obtained,⁽⁸⁾ which the court will do, if it appear that the *prochein amy* appointed had been long insolvent, and had not exerted himself to obtain a responsible person to act.⁽⁹⁾ The infant plaintiff is, it seems, never

(1) Otherwise it will be a ground of error, if judgment be given against the infant; *Bird v. Pegg*, 5 B. & Ald. 418; See 1 Lev. 224; 2 Sellen, 66.

(2) *Davis v. Locket*, 4 Taunt. 765; *Morgan v. Thorne*, 7 M. & W. 400.

(3) Bac. Abr. "Infant," K. 2.

(4) *Tomlin v. Brookes*, 1 Wils. 246.

(5) *Hayes v. Carr*, 3 M. & Gr. 852; 1 Dowl. N. S. 522.

(6) *Ibid.*

(7) *Mann v. Berthen*, 4 Moo. & P. 215, overruling *Yarmouth v. Mitchell*, 2 D. & R. 423.

(8) *Watson v. Fraser*, 8 M. & W. 660.

(9) *Duckett v. Satchwell*, 12 M. & W. 779; 1 D. & L. 980.

called on himself to give security for costs,⁽¹⁾ except in ejectment.⁽²⁾

Costs.]—The *prochein amy* or guardian is personally liable for the costs, not only to the defendant,⁽³⁾ but to the plaintiff's attorney; ⁽⁴⁾ and being an officer of the court, these can be recovered against him by attachment, the rule for an attachment being absolute in the first instance.⁽⁵⁾ The *allocatur* is served personally upon him, or, if that cannot be done, a rule may be obtained to make service in a particular way good service.⁽⁶⁾ Yet it seems that if an infant has been taken in execution under a *ca. sa.* for the costs, the court will not discharge him, whether he sued by *prochein amy*⁽⁷⁾ or not.⁽⁸⁾ But where the infant sued by guardian, it was held the guardian was not liable to costs of nonsuit.⁽⁹⁾ In some of these cases the court refused to interfere, saying the infant must be left to his writ of error; but now there can be "no error in respect of costs, but the error (if any) may be amended by the court on the application of either party."⁽¹⁰⁾

An infant is bound to pay the costs of making a judge's order against him a rule of court.⁽¹¹⁾ Where an arbitrator made an award, ordering an infant (who sued in one of three causes referred, and who had a substantial interest in the other two causes) to pay all the costs of the defence, the court refused to set it aside.⁽¹²⁾

2. Defendants.

An infant, who is about to abscond from the country, may, it seems, be held to bail as in other cases.⁽¹³⁾ Though

⁽¹⁾ *Yarmouth v. Mitchell*, 2 D. & R. 423.

⁽²⁾ *Anon.* 1 Wils. 130; *Doe v. Alston*, 1 T. R. 491.

⁽³⁾ *Sinclair v. Sinclair*, 13 M. & W. 640.

⁽⁴⁾ *Marnell v. Pickmore*, 2 Esp. 473.

⁽⁵⁾ *Newton v. London and Brighton Railway Company*, 7 D. & L. 328; *James v. Hatfield*, 1 Str. 548; *Evans v. Davis*, 1 C. & J. 460; *Slaughter v. Talbot*, Barnes, 128.

⁽⁶⁾ *Abrahams v. Taunton*, 1 D. & L. 319.

⁽⁷⁾ *Gardiner v. Holt*, 2 Str. 1217; *Dow v. Clarke*, 1 Cr. & M. 860; 2 Dowl. 302.

⁽⁸⁾ *Finlay v. Jowle*, 13 East, 6.

⁽⁹⁾ *Grave v. Grave*, Cro. Eliz. 33; *Turner v. Turner*, 2 P. Wms. 296; 1 Str. 708.

⁽¹⁰⁾ Rule Pl. 27 T. T. 1853.

⁽¹¹⁾ Rule Pr. 159 H. T. 1853; *Beames v. Farley*, 5 C. B. 178.

⁽¹²⁾ *Proudfoot v. Boyle*, 15 M. & W. 198.

⁽¹³⁾ *Madox v. Eden*, 1 B. & P. 480.

an infant can sue by *prochein amy* or guardian, he can defend by guardian only.⁽¹⁾ A guardian is appointed in the same manner as the guardian or *prochein amy* in the case of an infant plaintiff (*ante*, p. 637), the petition stating that he has a good defence, and naming a guardian to be assigned to him to defend the said suit. If the defendant neglects to enter an appearance, or enter it otherwise than by guardian, the plaintiff may apply at chambers to set aside the appearance, if necessary, and for a summons calling upon him to appear by guardian within a given time, otherwise the plaintiff may be at liberty to proceed as in other cases.⁽²⁾ This application to set aside may be made on the part of the infant by his father, or an attorney with the infant's consent, any time before judgment; ⁽³⁾ but, if delayed, the plaintiff will not get costs of the application, at least, unless he previously requested the defendant to name a guardian, and the latter refused.⁽⁴⁾ If the defendant appear otherwise than by guardian, and judgment be given against him in that character, he may bring error, though, if the judgment was in his favour, the plaintiff cannot do so on that ground.⁽⁵⁾ If the infant bring error on that ground, he must assign error by his guardian.⁽⁶⁾

Plea.—The plea must state⁽⁷⁾ that the defendant has been admitted to defend by guardian, and a copy of the order of admission or rule of court should be annexed to the plea when delivered.⁽⁸⁾ If infancy is the defence to the action, it must be specially pleaded in bar.⁽⁹⁾ It may be pleaded together with other pleas, as of course, without leave of the court

(1) 2 Inst. 261; *Stratton v. Burgis*, 1 Str. 114; *Goodwin v. Moore*, Cro. Car. 161.

(2) 2 Sellon, 68; 2 Saund. 117 f.; *Leech v. Clabburn*, 2 L. M. & P. 614. *Hindmarsh v. Chandler*, 7 Taunt. 488; *Gladman v. Baleman*, Barnes, 418; *Beven v. Cheshire*, 3 Dowl. 70; *Paget v. Thompson*, 3 Bing. 609; 11 Moore 504.

(3) *Nunn v. Curtis*, 4 Dowl. 729; *Shipman v. Stevens*, 2 Wils. 50; *Kerny v. Cade*, Barnes, 413.

(4) *Shipman v. Stevens*, 2 Wils. 50.

(5) *Bird v. Pegg*, 5 B. & Ald. 418; *Stephens v. Lowndes*, 3 D. & L. 207.

(6) *Beven v. Cheshire*, 3 Dowl. 7.

(7) Thus, "and the defendant by D. F., admitted by the said court here as guardian of the defendant to defend for him, he being an infant within the age of twenty-one years, says," &c.

(8) *Combers v. Walton*, 1 Lev. 224; *Simpson v. Jackson*, Cro. Jac. 640.

(9) Rule Pl. 8 T. T. 1853.

or a judge.⁽¹⁾ It is an issuable plea.⁽²⁾ A plea of infancy to an action for railway calls should allege, that the infant repudiated the contract within a reasonable time after he became of full age.⁽³⁾ Where there are several defendants, one of whom is an infant, he must plead his infancy separately; ⁽⁴⁾ and the plaintiff in such a case cannot enter a *nonne prosequi* against him, and proceed against the other defendants,⁽⁵⁾ the proper course being to discontinue and proceed *de novo* against the adults.⁽⁶⁾

Costs.—The infant defendant is liable for costs to the plaintiff, but his guardian is not; ⁽⁷⁾ though, it seems, the guardian is liable *primâ facie* for the costs of the defendant's attorney.⁽⁸⁾

Execution.—The infant defendant may be taken in execution on a *ca. sa*; ⁽⁹⁾ and may be outlawed if above twelve years of age.⁽¹⁰⁾

Error.—An infant must also proceed in error by guardian or *prochein amy*, and the court will set aside the assignment, if not so made.⁽¹¹⁾

Warrant of attorney, &c.—If an infant grants a warrant of attorney or cognovit, the court will set it aside, even though the consideration were for necessities; ⁽¹²⁾ but if he join an adult in giving one, and judgment be entered up against both, it will be vacated only as against the infant.⁽¹³⁾

⁽¹⁾ C. L. P. Act, 1852, s. 84, see *ante*, p. 187.

⁽²⁾ *Delafeld v. Tanner*, 5 Taunt. 856; 1 Marsh. 391, where the court allowed it to be pleaded after a regular judgment was set aside.

⁽³⁾ *Dublin and Wicklow Railway Company v. Black*, 8 Exch. 181; see also *Leeds, &c. Railway Company v. Fearnley*, 4 Ex. 26.

⁽⁴⁾ *Gillow v. Lillie*, 1 Bing. N. C. 695; *Power v. Jones*, 1 Str. 445.

⁽⁵⁾ 1 Saund. 207 a.; *Boyle v. Webster*, 17 Q. B. 950.

⁽⁶⁾ *Jaffray v. Fairburn*, 5 Esp. 47; *Noke v. Ingham*, 1 Wils. 89.

⁽⁷⁾ *Gardiner v. Holt*, 2 Str. 1217; *Dow v. Clark*, 1 Cr. & M. 860; 2 Dowl. 302.

⁽⁸⁾ *Marnell v. Pickmore*, 2 Esp. 473.

⁽⁹⁾ *Madox v. Eden*, 1 B. & P. 480; *Defries v. Davis*, 1 Bing. N. C. 692; 1 Hodg. 103; 3 Dowl. 629.

⁽¹⁰⁾ Co. Litt. 128 a.

⁽¹¹⁾ *Beven v. Cheshire*, 3 Dowl. 70.

⁽¹²⁾ *Oliver v. Woodroffe*, 7 Dowl. 166; 4 M. & W. 166; *Saunderson v. Marr*, 1 H. Bl. 75.

⁽¹³⁾ *Motteux v. St. Aubin*, 2 W. Bl. 1133; *Ashlin v. Langton*, 4 M. & Sc. 719.

CHAPTER III.

HUSBAND AND WIFE.

- | | | |
|----------------|--|--------------------------------|
| 1. Plaintiffs. | \| | 3. Marriage during the Action. |
| 2. Defendants. | | |

1. Plaintiffs.

Wife suing alone.—In actions of contract the wife is in general incompetent to sue alone while the marriage continues,⁽¹⁾ unless the husband is civilly dead, as where he is transported or exiled,⁽²⁾ attainted,⁽³⁾ or is presumed to be dead from seven years' absence abroad, and the cause of action would survive to her;⁽⁴⁾ or where he is an alien enemy,⁽⁵⁾ but not where he is an alien *ami*.⁽⁶⁾ The wife, being entitled by survivorship to all her choses in action not reduced by the husband into possession during the marriage, may, after his death, sue for these.⁽⁷⁾ In actions *ex delicto* the wife in general cannot sue alone, except in the circumstances above stated of her husband's transportation, &c., yet if she survive her husband, she may sue for injuries done to her person or property, either before or during coverture.⁽⁸⁾

Where the wife sues alone when she should not, the

(1) *Caudell v. Shaw*, 4 T. R. 361; where it was held that a *feme covert*, a sole trader in London, could not sue without her husband in the superior courts, though she might in the Mayor's court.

(2) *Jewson v. Read*, Lofft, 142; *Bellknap's case*, Co. Litt. 132; *Id.* 133; *Lean v. Shutz*, 2 W. Bl. 1195; *Sparrow v. Carruthers*, 1 T. R. 6.

(3) Co. Litt. 133 a.

(4) *Hopewell v. De Pinna*, 2 Camp. 113; *Doe d. Knight v. Nepean*, 5 B. & Ad. 94.

(5) *Barden v. Keverberg*, 2 M. & W. 61.

(6) *Ibid*; *Stretton v. Busnach*, 1 Bing. N. C. 139.

(7) Com. Dig. "Bar. and Feme," (F. 1); *Gaters v. Madeley*, 6 M. & W. 427; *Betts v. Kimpton*, 2 B. & Ad. 273.

(8) *Boggett v. Frier*, 11 East, 301; *Clarke v. Davis*, 7 Taunt. 72; Com. Dig. "Bar. and Feme," (2 A.)

defendant must plead the coverture in abatement and not in bar, provided the cause of action is such as would have survived to her.⁽¹⁾ He must also plead in abatement where she sues, either singly or jointly with other parties, on a contract entered into before marriage.⁽²⁾ The husband may also, it seems, bring error, assigning the coverture as a ground of error.⁽³⁾ If the wife could not sue at all on the particular cause of action, either with or without her husband, then it is proper to plead the coverture in bar; but, if otherwise, then it must be pleaded in abatement.⁽⁴⁾ Where a wife had bought railway stock in her own name, and sued alone for dividends, it was held the nonjoinder of the husband was only matter for a plea in abatement.⁽⁵⁾

A wife is not entitled to manage a cause for her husband at *Nisi Prius*, though she would be allowed to make an application for a *habeas corpus* on his behalf.⁽⁶⁾

When husband may sue alone or jointly with wife.—Where property accrues to the husband by right of his wife during the marriage, he may elect either to take it himself or give her an interest in it, i. e., he may sue alone or jointly with her.⁽⁷⁾ The wife may always be properly joined, if the cause of action would survive to her.⁽⁸⁾ Thus her choses in action may be sued on by both, or by the husband alone, in which latter case he reduces them into possession.⁽⁹⁾ It is often a question of nicety, whether the wife has such an interest as to entitle her to join in suing.⁽¹⁰⁾ In actions *ex delicto*, when the wife is the meritorious cause of action, or where the cause of action accrued only in its inception before marriage, the husband alone, or both, may sue.⁽¹¹⁾ But where there is no misfeasance towards the wife independently of

(1) *Guyard v. Sutton*, 3 C. B. 153; Com. Dig. "Pleader,"

(2 A. 1); *Milner v. Milnes*, 3 T. R. 631.

(3) Com. Dig. "Abatement," (H. 42.)

(4) *Milner v. Milnes*, 3 T. R. 631.

(5) *Morgan v. Cubitt*, 3 Exch. 612.

(6) *Dalton v. Midland Railway Company*, 13 C. B. 474.

(7) *Cobbett v. Hudson*, 15 Q. B. 988.

(8) *Bendix v. Wakeman*, 1 D. & L. 452; 12 M. & W. 97.

(9) *Ayling v. Whicher*, 6 A. & E. 264.

(10) *Gaters v. Maddeley*, 6 M. & W. 426.

(11) *Wills v. Nurse*, 1 A. & E. 65; *Guyard v. Sutton*, 3 C. B. 153; *Scarpellini v. Atcheson*, 7 Q. B. 864; *Hart v. Stephens* 6 Q. B. 937.

(12) *Newton v. Boodle*, 9 Q. B. 948; *Blackborn v. Greaves*, 2 Lev. 107; *Fenner v. Plasket*, Cro. Eliz. 459; *Wallis v. Harrison*, 5 M. & W. 142; 7 Dowl. 595.

some contract entered into with the husband, she cannot be joined.⁽¹⁾ Where both join in suing on an account stated, it must be alleged that the accounting was concerning matters in which she had an interest.⁽²⁾ Where the wife's rents of her separate estate have been paid by her trustees to her hands, the husband may sue for the money after her death.⁽³⁾

If the wife sue jointly when she ought not, and the defect appear on the pleadings, the defendant may demur⁽⁴⁾ or arrest the judgment,⁽⁵⁾ or bring error,⁽⁶⁾ unless the court or judge allow an amendment under the C. L. P. Act, 1852, s. 35.

When both must join.]—When a complete cause of action accrued to the wife before marriage, both she and her husband must sue.⁽⁷⁾ So, where the cause of action arose during marriage, in respect of a chose in action vested in her before marriage.⁽⁸⁾ So, where the cause of action accrued to the wife *en autre droit*.⁽⁹⁾ So, in actions *ex delicto*, where the tort was to her property before marriage, or to her person, whether before or during coverture.⁽¹⁰⁾

If the husband sue alone when the wife should be added, and the defect appear on the pleadings, the defendant may, as in case of misjoinder, demur, or arrest the judgment, or bring error;⁽¹¹⁾ but if the defect do not so appear, the plaintiff may at least be nonsuited.⁽¹²⁾

“In any action brought by a man and his wife for an injury done to the wife, in respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right, and separate actions brought in respect of such claims may be consolidated, if the court or a judge shall think fit: provided that, in the case

(1) *Longmeid v. Holliday*, 6 Exch. 761.

(2) *Johnson v. Lucas*, 1 E. & B. 659.

(3) *Bird v. Peagrum*, 13 C. B. 639.

(4) *Buckley v. Collier*, 1 Salk. 114; *Rose v. Bowler*, 1 H. Bl. 108.

(5) *Nurse v. Wills*, 4 B. & Ad. 739.

(6) *Bidgood v. Way*, 2 W. Bl. 1236.

(7) *Sherrington v. Yates*, 1 D. & L. 1040; 12 M. & W. 855.

(8) *Ibid*; *Hopkins v. Logan*, 5 M. & W. 241; *Gaters v. Madeley*, 6 M. & W. 427; *Scarpelini v. Atcheson*, 7 Q. B. 864.

(9) Co. Litt. 351, b.; Com. Dig. “Bar. and Feme,” (V.)

(10) *Milner v. Milnes*, 3 T. R. 627; *Saville v. Sweeny*, 4 B. & Ad. 523.

(11) *Aleberry v. Walby*, 1 Str. 229.

(12) *Anon.* 1 Salk. 282.

of the death of either plaintiff, such suit, so far only as relates to the causes of action, if any, which do not survive, shall abate."⁽¹⁾

Authority to use each other's name to sue.—If the husband authorize an attorney to use his and his wife's name in prosecuting or defending an action, the court will not change the attorney at the husband's instance, where the husband's object is to defeat the wife in trying her right.⁽²⁾ Where the wife, being an executrix, sued in her and her husband's name, he living apart and not authorizing the action, the court stayed proceedings till an indemnity against costs should be given to him.⁽³⁾ Where an action was brought by a wife against her husband on a settlement deed in the name of her trustee, the court refused, on the application of the defendant, to set aside the proceedings as brought without the trustee's authority, it appearing that the wife had asked the trustee's leave and offered him an indemnity against costs.⁽⁴⁾

If the husband be resident abroad, he must give security for costs, though the wife, who joins in the action, reside in England.⁽⁵⁾

Form of Declaration by Husband and Wife.

— } A. B. and his wife, by their attorney, sue
to wit. } C. D. for goods sold and delivered by the said while
she was sole and unmarried, and for money found to be due from the
defendant to the said on accounts stated between them, and the
plaintiffs claim £ .

When husband and wife both sue for slander of the wife, it is a good plea in bar, and not merely in abatement, that she is not the wife of the other plaintiff.⁽⁶⁾

2. Defendants.

When husband must be sued alone.—The husband must, in general, in actions of contract, be sued alone on a cause

(1) C. L. P. Act, 1852, s. 40.

(2) *Wynne v. Wynne*, 2 Sc. N. R. 615; 9 Dowl. 396.

(3) *Procter v. Brotherton*, 9 Exch. 486.

(4) *Auster v. Holland*, 3 D. & L. 740

(5) *Hanmer v. Mangles*, 12 M. & W. 313.

(6) *Chantler v. Lindsay*, 16 M. & W. 82.

of action which has accrued during coverture ;⁽¹⁾ or where he has charged himself in writing for some valid consideration with the debts of the wife previous to marriage ;⁽²⁾ and if an action would lie against the husband alone during the marriage, the action will lie against him surviving, or his personal representatives.⁽³⁾ In trover, if the conversion was by the husband, he must be sued alone.⁽⁴⁾ If the husband survive, he cannot be sued for a tort of the wife, committed either before or during marriage, unless he was a joint tort-feasor.⁽⁵⁾

If the wife is joined as defendant in such actions, she may demur,⁽⁶⁾ or move in arrest of judgment,⁽⁷⁾ or bring error.⁽⁸⁾

Where wife alone is sued.—In general a wife cannot be sued alone, though living apart with a separate maintenance,⁽⁹⁾ and although a sole trader in the city of London,⁽¹⁰⁾ except where the husband is transported, banished, an alien enemy, or presumed to be dead.⁽¹¹⁾ If the wife survive, then she may be sued on all causes of action which accrued prior to the coverture ;⁽¹²⁾ and in case of tortious acts committed by her, either before or during marriage, or jointly with the husband, so that an action would have lain against both, the cause of action would survive against her.⁽¹³⁾

Where the husband may be sued alone or jointly with wife.—Where the wife before marriage was a lessee, or the husband and wife took a lease jointly, an action for rent or for breach of the covenant during coverture may be brought against the husband alone, or against both jointly.⁽¹⁴⁾ So.

(1) Vin. Abr. "Bar. and Feme," (U.) (X.)

(2) *Beaumont v. Reeve*, 8 Q. B. 483 ; *Eastwood v. Kenyon*, 11 A. & E. 438.

(3) *Payne v. Minshall*, T. Raym. 6 ; 1 Lev. 25.

(4) 2 Wms. Saund. 47, u.

(5) Com. Dig. "Bar. and Feme," (2, B.) (2, C.)

(6) *Vine v. Saunders*, 4 Bing. N. C. 96.

(7) Com. Dig. "Bar. and Feme," (Y.)

(8) *Swithin v. Vincent*, 2 Wils. 227.

(9) *Lewis v. Lee*, 3 B. & C. 291 ; *Marshall v. Rutton*, 8 T. R. 545 ; *Faithorne v. Blaquiere*, 6 M. & Sel. 73.

(10) *Beard v. Webb*, 2 B. & P. 93.

(11) See ante, p. 642.

(12) *Mitchinson v. Hewson*, 7 T. R. 348 ; *Woodman v. Chapman*, 1 Camp. 189.

(13) *Vine v. Saunders*, 4 Bing. N. C. 102.

(14) Com. Dig. "Bar. and Feme," (Y.)

trespass for the joint act of husband and wife may be brought against both, or the husband alone.⁽¹⁾

Where both must be sued jointly.—Where the action is brought for a breach of the wife's contracts, or debts incurred by her, before marriage, both husband and wife must be sued.⁽²⁾ So, where she is sued *en autre droit*, as an executrix.⁽³⁾ So, where a tortious act was committed by her before marriage, or she was guilty of an assault or slander, or libel during marriage, both must be joined as defendants, though they live separate.⁽⁴⁾

Proceedings in the action.—Service of the writ of summons on the husband, where both are sued, is sufficient.⁽⁵⁾ The defendants must appear by the same attorney, for the husband can appoint one for both,⁽⁶⁾ and it is ground of error for each to appear by a separate attorney.⁽⁷⁾ It is an irregularity for the appearance to be entered by the husband alone.⁽⁸⁾ A plea by either alone is a nullity.⁽⁹⁾ Where the wife is sued alone, she must appear and plead in person,⁽¹⁰⁾ and she must plead her coverture specially.⁽¹¹⁾ The plea will be in bar, where the coverture existed when the cause of action accrued; and it is an issuable plea.⁽¹²⁾ If the coverture took place after the cause of action accrued, then it must be pleaded in abatement.⁽¹³⁾

(1) *Vine v. Saunders*, 4 Bing. N. C. 102; *Smalley v. Kerfoot*, 2 Str. 1094; *Keyworth v. Hill*, 3 B. & Ald. 686.

(2) Bac. Abr. "Bar. and Feme," 4. Where the contract has been made by the wife before marriage, she cannot during marriage by a promise, or payment of interest without the husband's privity, keep alive the contract; *Neve v. Hollands*, 18 Q. B. 262.

(3) *Mounson v. Bourne*, Cro. Car. 518; *Id.* 603.

(4) Com. Dig. "Bar. and Feme," (Y.); *Head v. Briscoe*, 5 C. & P. 484.

(5) Pr. Reg. 351.

(6) 2 Wms. Saund. 213.

(7) *Maddox v. Winne*, 3 Salk. 62.

(8) *Wigg v. Rook*, 1 Salk. 115; 6 Mod. 86; see *Clarke v. Norris*, 1 H. Bl. 236.

(9) *Russell v. Buchanan*, 6 Price, 139.

(10) 2 Wms. Saund. 209 b.; *Fryer v. Andrews*, 1 Exch. 471; 5 D. & L. 221; *Graham v. Jackson* 6 Q. B. 811.

(11) Rule Pl. 8 T. T. 1853.

(12) *Birch v. Leake*, 2 D. & L. 88.

(13) *Milner v. Milnes*, 3 T. R. 631; *Guyard v. Sutton*, 3 C. B. 153; *Morgan v. Cubitt*, 3 Exch. 612.

Form of Plea of Coverture in Bar.

The defendant in person says, that at the time of the making of the said alleged promise in the declaration mentioned, she, the defendant, was [and still is] the wife of one D. H., and this the defendant is ready to verify.

Form of Plea of Coverture in Abatement.⁽¹⁾

The defendant D. W., sued by the name of C. D., in person prays judgment of the said writ and declaration, because, she says, that at the time of the commencement of this suit she was and still is married to one D. H., who is still living, and this the defendant is ready to verify: wherefore, because the said D. H. is not named in the said writ and declaration, the defendant prays judgment of the said writ and declaration, and that the same may be quashed, &c.

Costs and execution.]—Where the wife has been improperly sued alone, and has pleaded her coverture in person, and succeeded on the issue taken thereon, she is entitled to her costs out of pocket;⁽²⁾ and she may have execution for the costs in her own name.⁽³⁾ Where the husband and wife are parties, and costs are given against them, a *ca. sa.* may issue against both;⁽⁴⁾ and the female plaintiff may be made to pay the costs of any incidental application to the court for relief from costs, if it is unfounded.⁽⁵⁾ The proper time for the wife to apply for relief from imprisonment is when she is taken in execution, and then she will be discharged only, but not necessarily, if she has no separate property of her own.⁽⁶⁾ If, when she is rightly sued alone, she stay proceedings on payment of costs, but marry before payment, judgment may be entered up against her in her maiden name, and a *ca. sa.* issued against her alone.⁽⁷⁾ So, where the wife has been rightly sued alone, but married before execution, she will not be discharged,⁽⁸⁾ or it seems if a *ca. sa.* has been issued against her alone, the court will refuse to

⁽¹⁾ There must be an affidavit of the truth of this plea; see *post*, "Plea in Abatement."

⁽²⁾ *Findley v. Farquharson*, 3 C. B. 347.

⁽³⁾ *Wortley v. Rayner*, 2 Dowl. 637; 2 Saund. 72.

⁽⁴⁾ *Newton v. Boodle*, 9 Q. B. 948.

⁽⁵⁾ *Newton v. Boodle*, 4 C. B. 359; see also *R. v. Johnson*, 5 Q. B. 336, where she was ordered to pay costs.

⁽⁶⁾ *Ibid*; *Newton v. Rowe*, 2 D. & L. 815; 7 M. & Gr. 329.

⁽⁷⁾ *Thorpe v. Argles*, 1 D. & L. 831.

⁽⁸⁾ *Benyon v. Jones*, 15 M. & W. 566; 3 D. & L. 667.

discharge her ;⁽¹⁾ but the Court of Queen's Bench has in such cases discharged her.⁽²⁾ An attachment against the wife for nonpayment of costs will not be granted.⁽³⁾

3. *Marriage during Action.*

Between writ and judgment.]—"The marriage of a woman plaintiff or defendant shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment, and such judgment may be executed against the wife alone; or by suggestion, or writ of revivor, pursuant to this act, judgment may be obtained against the husband and wife, and execution issue thereon; and in case of a judgment for the wife, execution may be issued thereupon by the authority of the husband, without any writ of revivor or suggestion; and if in any such action the wife shall sue or defend by attorney appointed by her when sole, such attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the attorney changed according to the practice of the court."⁽⁴⁾

After judgment.]—The above enactment applies only to the marriage, when it occurs between writ and judgment.⁽⁵⁾

If the feme has obtained the judgment before marriage, the husband may sue out a *scire facias*,⁽⁶⁾ or revive the judgment by suing out a writ of revivor or entering a suggestion.⁽⁷⁾ If after so reviving the judgment and issuing execution the wife die, the husband may take all further proceedings in his own name,⁽⁸⁾ but he must first take out letters of administration.⁽⁹⁾ If a judgment was obtained by the husband and wife for a debt due to her as executrix of D., and she die before execution, the executor or administrator of D. *de bonis non*, and not her executor, is entitled to a *sci. fa.*⁽¹⁰⁾

If the judgment is against the feme sole, and she then marries, a *ca. sa.* may nevertheless issue against her per-

⁽¹⁾ *Larkin v. Marshall*, 1 L. M. & P. 186; 4 Exch. 804.

⁽²⁾ *Edwards v. Martin*, 2 L. M. & P. 669; 17 Q. B. 693.

⁽³⁾ *Doe d. Allanson v. Caufield*, 6 Dowl. 523.

⁽⁴⁾ C. L. P. Act, 1852, s. 141.

⁽⁵⁾ *Morris v. Coates*, 25 L. T. 176, 12th June, 1855.

⁽⁶⁾ C. L. P. Act, 1852, s. 132, *post*, "Sci. fa."

⁽⁷⁾ C. L. P. Act, 1852, s. 129 *et seq.*, *post*, "Revivor."

⁽⁸⁾ *Woodyer v. Gresham*, 1 Salk. 110; Skin. 642.

⁽⁹⁾ *Betts v. Kimpton*, 2 B. & Ad. 273.

⁽¹⁰⁾ Bac. Abr. "Sci. fa." C. 6.

sonally.⁽¹⁾ But before the husband can be subject to execution, the judgment must be revived against him.⁽²⁾

Form of Writ of Revivor against Husband and Wife, who Married before Judgment.

VICTORIA, &c., to E. F. of _____, and C. his wife of the same place, greeting: Whereas A. B. lately, and whilst you the said C. was sole and unmarried, impleaded and sued you the said C., by your then name of C. D., in our Court of _____, in an action at his suit, and afterwards and whilst the said action was pending you the said C. intermarried with the said E. F., and afterwards, that is to say, on the _____ in our Court of _____, by the judgment of the said court the said A. B. recovered in the said action against you, the said C., by the name of C. D., the sum of £ _____, as by the information of the said A. B., in our said court, we are given to understand. And now on behalf of the said A. B., in our said court, we have been informed that, although judgment be given as aforesaid, yet execution of the said £ _____ still remains to be made to him, wherefore the said A. B., having besought us to provide him a proper remedy in this behalf, we command you that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our said Court of _____, to show cause why A. B. should not recover against you the said £ _____, by the judgment of the said court, and have execution against you of such judgment. And take notice, that in default of your so doing the said A. B. may proceed to execution. Witness, &c.

Form of Suggestion where a Wife Married after Judgment against her.

And now, on the _____ day of _____ it is suggested and manifestly appears to the court that after the obtaining of the said judgment the said C. D. married E. F., and that the said A. B. is entitled to have execution of the judgment aforesaid against the said E. F. and C. his wife. Therefore it is considered by the court that the said A. B. ought to have execution of the said judgment against the said E. F. and C. his wife.

(¹) *Thorpe v. Argles*, 1 D. & L. 831; see *ante*, p. 648.

(²) *Bac. Abr.* "Sci. fa." 6; *O'Brien v. Ram*, 1 Salk. 116.

CHAPTER IV.

EXECUTORS AND ADMINISTRATORS.

1. Plaintiffs.

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2. Defendants.

1. *Plaintiffs.*

When to sue.—The executors or administrators of a party may bring an action of assumpsit within the same period of limitation as the party himself could have done if alive, provided the right of action is one which survives; or where the period of limitation did not expire in the lifetime of the party, but within a year after the death, then the action may be brought any time within one year from the death.⁽¹⁾ Where, however, the cause of action accrues after the death of an intestate, but before administration, the period of limitation is counted from the date of administration, the statute not beginning to run till there is a party capable of suing.⁽²⁾ Where the party died abroad, and the cause of action had accrued to him there, but he had never come to this country afterwards, the executor may sue any time during six years after the death.⁽³⁾ Executors or administrators may also sue for trespass to their testator's goods done in his lifetime, within the same period as he could have sued if alive.⁽⁴⁾ The personal estate of the deceased vests in the executor at the testator's death, and the title of the administrator relates back to the same date, when the letters of administration are taken out; and therefore they

⁽¹⁾ 2 Wms. Exec. 1601 (4th edit.)

⁽²⁾ *Murray v. East India Company*, 5 B. & Ald. 204; *Rhodes v. Smethurst*, 4 M. & W. 42.

⁽³⁾ *Townsend v. Deacon*, 3 Exch. 706.

⁽⁴⁾ 4 Edw. 3, c. 7; *Wilson v. Knubley*, 7 East, '134; *Doe d. Shore v. Porter*, 3 T. R. 13.

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may maintain trespass or trover for his goods taken between the death and the grant of probate or of letters of administration.⁽¹⁾ This rule applies also to injuries done to leasehold property; but in that case the administrator must first enter.⁽²⁾ The doctrine of relation, by which the letters of administration are held to relate back to acts done before taking out the letters, exists only in those cases where the act done is for the benefit of the estate;⁽³⁾ but detinue cannot be maintained by an administrator against a person who has had possession of the goods of the intestate, but has ceased to hold them prior to the grant of administration.⁽⁴⁾ Where, however, goods of an intestate were sold by a stranger to pay the debts of the former, the title of the administrator afterwards appointed was held to relate back so as to enable him to sue the stranger for money had and received.⁽⁵⁾ Where an executor has allowed legacy duty to be unpaid, and the legatee to have possession of the subject matter of bequest for years, the executor, when called to pay increased duty, may recover the whole from the legatee as moneys paid to his use.⁽⁶⁾

When any injury is done to the real estate of the deceased within six months before his death, his executors or administrators may bring an action of trespass or case within a year after his death, provided he himself could have brought such action if alive.⁽⁷⁾

In the case of the death of a person occasioned by the wrongful act, neglect, or default of another, where such person could have sued, if alive, for the same, the executor or administrator may sue, and must do so, within twelve calendar months after the death; and the plaintiff must with the declaration deliver a full particular of the persons on whose behalf the action is brought, and of the nature of the claim.⁽⁸⁾ In such cases the negligence of the deceased must not have contributed to the accident.⁽⁹⁾

Co-executors, &c.—Where there are several executors or

⁽¹⁾ *Yorston v. Fether*, 14 M. & W. 851; *Welchman v. Sturgis*, 13 Q. B. 552.

⁽²⁾ *Barnett v. Earl of Guildford*, 11 Exch. 19.

⁽³⁾ *Morgan v. Thomas*, 8 Exch. 302.

⁽⁴⁾ *Crossfield v. Such*, 8 Exch. 825.

⁽⁵⁾ *Welchman v. Sturgis*, 13 Q. B. 552.

⁽⁶⁾ *Bate v. Payne*, 13 Q. B. 900.

⁽⁷⁾ 3 & 4 Will. 4, c. 42, s. 2.

⁽⁸⁾ 9 & 10 Vict. c. 93 (Lord Campbell's Act.)

⁽⁹⁾ *Thorogood v. Bryan*, 8 C. B. 115. See a form of declaration in such cases, *Dakin v. Brown*, 8 C. B. 92.

administrators, all must join in suing,⁽¹⁾ though one executor only has proved the will⁽²⁾ and the others have renounced probate.⁽³⁾ Where, however, a contract has been made by one or some of the executors, not as representing the whole but in their personal character, then those who made the contract must alone sue.⁽⁴⁾ Two of three co-executors may recover in ejectment, on a demise in the names of both.⁽⁵⁾ Where one of the co-executors or co-administrators dies, his representatives need not be joined.⁽⁶⁾ Where B., the sole executor of A., dies after having proved A.'s will, B.'s executor then may sue as representing A.;⁽⁷⁾ but if B. died intestate, or if B. was A.'s administrator, then on B.'s death an administrator *de bonis non* must be appointed to A.⁽⁸⁾

The nonjoinder of co-executors or co-administrators must be taken advantage of by plea in abatement.⁽⁹⁾ It is no answer to an action by several co-executors, that one of them had renounced the executorship, or never taken part in the administration.⁽¹⁰⁾

If the executor has been appointed by a Scotch or Irish court, he must also take out probate or letters of administration in the court here, before he can bring an action here. But where he has taken out probate here, the defendant cannot plead that the deed, on which the action is brought, was part of the goods to be administered in the foreign country, or in Ireland or Scotland.⁽¹¹⁾

Summons and capias.—The writ of summons need not describe the plaintiff "as executor or administrator of," but if it does so, he cannot (without first amending) declare in his own right.⁽¹²⁾ It seems also a writ of *capias* need not

(1) *Brassington v. Ault*, 2 Bing. 178; Com. Dig. Admin. (B. 12); *Smith v. Smith*, Yelv. 130.

(2) *Webster v. Spencer*, 3 B. & Ald. 363.

(3) *Venables v. East India Company*, 2 Exch. 633.

(4) *Heath v. Chilton*, 12 M. & W. 632; *Brassington v. Ault*, 2 Bing. 178; *Turner v. Hardy*, 9 M. & W. 770.

(5) *Doe d. Stace v. Wheeler*, 15 M. & W. 623.

(6) *Hudson v. Hudson*, Cas. temp. Talb. 127; *Jacomb v. Harwood*, 2 Ves. 268.

(7) *Wankford v. Wankford*, 1 Salk. 308.

(8) 2 Bl. Com. 506; *Elliot v. Kemp*, 7 M. & W. 306.

(9) 1 Wms. Saund. 291 l; *Tuckey v. Hawkins*, 4 C. B. 655.

(10) *Creswick v. Woodhead*, 4 M. & Gr. 811; 5 Sc. N. R. 778.

(11) See *Whyte v. Rose*, 3 Q. B. 493.

(12) *Douglas v. Irlaw*, 8 T. R. 410; *Anon.* 1 Dowl. 97. See *Free v. White*, 1 Dowl. N. S. 586; and *ante*, p. 127.

describe the plaintiff in his representative character,⁽¹⁾ nor need the affidavit of debt;⁽²⁾ moreover, the affidavit in such cases need only swear to the executor's belief of the debt, for in the circumstances he cannot do more.⁽³⁾

Though the executor may commence the action before taking out probate, and it is enough that he have probate before trial, still the court will, on application by the defendant, stay the proceedings until probate should be taken out, and reasonable notice thereof given to the defendant.⁽⁴⁾ The administrator, however, cannot commence an action before he has obtained letters, which are his sole authority.⁽⁵⁾

Pleadings.—The plaintiff must in the declaration state his representative character,⁽⁶⁾ unless the contract was made with him subsequent to the death, or completed by him.⁽⁷⁾ In an action for goods, the right to which vested in him by virtue of his representative character, he may either declare as such, or, in his individual capacity, whether he was ever actually possessed of the goods or not.⁽⁸⁾ To an action by an administrator, who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime.⁽⁹⁾ The plaintiff need not in the declaration make profert of the probate of the will or letters of administration;⁽¹⁰⁾ but if probate has not been taken out, the defendant may apply for a stay of proceedings until he should do so, and give notice to the defendant thereof.⁽¹¹⁾ The plaintiff cannot join causes of action accruing in his own right with causes accruing in right of the deceased, for it is only where the money recovered on each count will be assets that the counts can be joined.⁽¹²⁾

(1) *Ashworth v. Royal*, 1 B. & Ad. 19; *Marzetti v. Jouffroy*, 1 Dowl. 44; but see *Manesty v. Stevens*, 9 Bing. 400; 1 Dowl. 711.

(2) *Ilsey v. Ilsey*, 2 C. & J. 330; 1 Dowl. 310.

(3) *Sheldon v. Baker*, 1 T. R. 87; *Roche v. Carey*, 2 W. Bl. 850.

(4) *Webb v. Adkins*, 14 C. B. 401.

(5) See 1 Wms. Exec. 332 (4th edit.); see also *Holland v. King*, 6 C. B. 727.

(6) 1 Wms. Saund. 112 n (1)

(7) *Edwards v. Grace*, 2 M. & W. 190.

(8) *Hollis v. Smith*, 10 East, 293.

(9) *Watts v. Rees*, 9 Exch. 696.

(10) C. L. P. Act, 1852, s. 55, *ante*, p. 120.

(11) *Webb v. Adkins*, 14 C. B. 401.

(12) *Piper v. Chappell*, 14 M. & W. 624; *Webb v. Cowdell*, 14 N. & W. 820.

"In all actions by and against assignees of a bankrupt, or insolvent, or executors, or administrators, or persons authorized by act of Parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued shall not in any case be considered as in issue, unless specially denied."(¹)

Form of Declaration by an Executor or Administrator.

— } A. B., executor of the last will and testament of E. F.,
to wit. } deceased [or administrator of all and singular the goods,
chattels and credits which were of E. F., deceased, at the time of his
death, who died intestate, (or death, in the last will and testament of
the said E. F. annexed)] [or of G. H. deceased, which said G. H., in
his lifetime and at the time of his death, was executor of the last will
and testament of E. F., deceased, (or administrator with the last will
and testament of G. H., deceased, annexed, of all and singular the goods,
chattels and credits which were of the said G. H. at the time of his
death, left unadministered by G. H., deceased, who in his lifetime and
at the time of his death was executor of the said last will and testa-
ment of the said E. F.)], complains of C. D., who has been summoned
to answer the said A. B. as executor (or administrator) as aforesaid,
in an action, &c.: For that whereas the defendant in the lifetime of the
said E. F., to wit, &c., yet the defendant hath disregarded, &c., either
to the said E. F. in his lifetime or to the plaintiff, executor (or ad-
ministrator) as aforesaid, since the death of the said E. F. [or, or to the
said G. H., executor as aforesaid, in his lifetime, after the death of the
said E. F., or to the plaintiff executor as aforesaid after the respective
deaths of the said E. F. and G. H.] [or, or to the said G. H. in his life-
time, now deceased, (which said G. H. in his lifetime and at the time
of his death was executor of the last will and testament of the said
E. F. deceased,) or to the plaintiff administrator as aforesaid since the
death of the said G. H.]

Costs.—If the plaintiff succeeds, he gets his costs, as usual in other cases. "In every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall (unless the court, in which such action is brought, or a judge of any of the superior courts, shall otherwise order) be liable to pay costs to the defendant in case of being nonsuited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be

(¹) Rule Pl. 5, T. T. 1853.

recovered in like manner.”⁽¹⁾ The plaintiff must thus make out special grounds to satisfy the court that he ought to be exempted from paying costs, such as that he not only acted *bonâ fide* himself, but that the defendant has been guilty of misconduct likely to mislead the plaintiff, though mere silence on defendant's part is not enough.⁽²⁾ It is not a sufficient ground of exemption, that the plaintiff was advised by counsel to bring the action, that defendant's pleas were prolix, and that the defendant omitted to give the plaintiff information which the plaintiff did not ask for, but which might have prevented him from bringing the action.⁽³⁾

The application for exemption must be made to a judge at chambers, or the court, on affidavit; but where the same judge is applied to who tried the cause, no affidavit seems necessary.⁽⁴⁾ It seems the court may review the decision of the judge.⁽⁵⁾

The plaintiff is, independently of the above act, always liable to costs, where suing on a contract made with himself,⁽⁶⁾ or where he made default, as by not proceeding to trial, or by suffering judgment of *non pros.*;⁽⁷⁾ and the action may be discontinued until such costs are paid;⁽⁸⁾ and the court will not suspend payment of the costs, till assets come to hand.⁽⁹⁾

An executor or administrator will not be allowed to sue *in formâ pauperis*.⁽¹⁰⁾ He may be called upon to give security for costs, like other plaintiffs.⁽¹¹⁾

2. Defendants.

An executor cannot be sued until he has in some way acted as such by intermeddling with the deceased's estate or proving the will.⁽¹²⁾ A person knowingly taking goods of the testator from an executor *de son tort*, and dealing with

(1) 3 & 4 Will. 4, c. 42, s. 31.

(2) *Birkhead v. North*, 4 D. & L. 732.

(3) *Farley v. Briant*, 3 A. & E. 839.

(4) *Maddock v. Phillips*, 3 A. & E. 198.

(5) *Ibid.*; *Laken v. Massie*, 4 Dowl. 239.

(6) 23 Hen. 8, c. 16; *Spence v. Albert*, 2 A. & E. 785.

(7) *Pickup v. Wharton*, 2 Cr. & M. 401; *Woolley v. Sloper*, 9 Bing. 754; *Comber v. Hardcastle*, 3 B. & P. 117.

(8) *Ibid.*; *Harris v. Jones*, 1 W. Bl. 451.

(9) *Andrews v. Sealy*, 8 Price, 212.

(10) *Paradise v. Sheppard*, 1 Dick. 136; *Oldfield v. Cobbett*, 1 Phill. 613.

(11) *Chamberlain v. Chamberlain*, 1 Dowl. 366.

(12) *Venables v. East India Company*, 2 Exch. 633.

them as his own, does not thereby make himself executor *de son tort*.⁽¹⁾ An executor *de son tort* of a rightful executor is liable in the same manner as a rightful executor for the debt of the original testator.⁽²⁾ An executor cannot be sued for things done by an agent of the testator after the death, for the authority was revoked by that event.⁽³⁾ Where the ordinary to whom a bond was given by the administrator dies, the latter must be sued thereon by the personal representative and not by the successor of such ordinary.⁽⁴⁾ The power of an executor to dispose of the property is not affected by the mere filing of a bill in equity to administer the estate.⁽⁵⁾ Where a party signed a promissory note before death, and his executor, finding it, delivered it to the payee, it was held the payee could not sue on it, as it was no valid indorsement.⁽⁶⁾

Where the party lived abroad, and never returned to England after the cause of action accrued against him, his executor in England may be sued within the period of limitation, counted from the time when he obtained probate.⁽⁷⁾ But if the Statute of Limitations had once begun to run, it would be no answer to a plea setting up the statute, that the party to be sued had gone abroad or died, and his executor did not prove the will within the period of limitation.⁽⁸⁾ It seems payment by one executor will not take the case out of the Statute of Limitations as against a co-executor.⁽⁹⁾

Where any wrong has been committed by a person, within six months previous to his death, towards another in respect of the latter's property, real or personal, the party wronged may bring an action of trespass or case within six calendar months after the executors or administrators of the wrongdoer shall have taken upon themselves the administration of the estate and effects, and the damages to be recovered in such action are payable as the simple contract debts of the deceased.⁽¹⁰⁾ The remedy given by this statute being merely

(1) *Paull v. Simpson*, 9 Q. B. 365.

(2) *Meyrick v. Anderson*, 14 Q. B. 719.

(3) *Campanari v. Woodburn*, 15 C. B. 400.

(4) *Howley v. Knight*, 14 Q. B. 240.

(5) *Bryan v. Clay*, 1 E. & B. 38.

(6) *Bromage v. Lloyd*, 1 Exch. 32.

(7) *Douglas v. Forrest*, 4 Bing. 486.

(8) *Rhodes v. Smethurst*, 4 M. & W. 42; 6 M. & W. 351.

(9) Per Parke, B., *Scholey v. Walton*, 12 M. & W. 510.

(10) 3 & 4 Will. 4, c. 42, s. 2.

for torts during six months, if damage has accrued in respect of the tort during prior time, the tort may be waived and assumpsit brought.⁽¹⁾

No action can be brought against the executors or administrators of A. for a tort committed by A. on the person of B.⁽²⁾

Executors or administrators cannot be held to bail, unless they have promised, in writing, to pay the debts of the deceased or have been guilty of a devastavit.⁽³⁾

Executors may be sued in the County Court for a legacy under 50*l.*,⁽⁴⁾ and a question of devastavit may be tried in such court.⁽⁵⁾

Co-executors.—In general all the co-executors or co-administrators must be joined as defendants;⁽⁶⁾ but if any one of them has died, his representatives must not be joined,⁽⁷⁾ unless where they all joined in an executory contract, in which case the representatives of the deceased are held impliedly to contract to pay a share;⁽⁸⁾ nor perhaps is it necessary to join, as co-defendant, an executor who has renounced probate and never intermeddled,⁽⁹⁾ nor an executor *de son tort*, where there is a rightful executor.⁽¹⁰⁾

Writ of summons.—The writ of summons need not describe the executors or administrators as such.⁽¹¹⁾ It must be served on all the co-executors or co-administrators.⁽¹²⁾

Declaration.—The declaration must be either against the executors or administrators as such, or against them in their personal character, for counts in the two characters cannot

(1) *Powell v. Rees*, 7 A. & E. 426; *Humbley v. Trott*, 1 Cowp. 376; *Powell v. Layton*, 2 N. R. 370.

(2) 3 Bl. Com. 302; *Ireland v. Champneys*, 4 Taunt. 884.

(3) 3 Bl. Com. 292; 29 Ch. 2, c. 3; *Mackenzie v. Mackenzie*, 1 T. R. 716; *Page v. Price*, 1 Salk. 98.

(4) 9 & 10 Vict. c. 95, s. 65; *Pears v. Wilson*, 6 Exch. 833; *Gibbon v. Gibbon*, 13 C. B. 205; *Winterbottom v. Winterbottom*, Exch. 1852. *Ellis v. Watt*, 8 C. B. 614; 7 D. & L. 299.

(5) *Winch v. Winch*, 13 C. B. 128.

(6) *Nation v. Tozer*, 1 C. M. & R. 174; Com. Dig. "Admin." (B. 12.)

(7) *Hall v. Huffham*, 2 Lev. 228.

(8) *Prior v. Hambrow*, 8 M. & W. 889.

(9) *Cummins v. Cummins*, 3 J. & L. 92; *Venables v. East India Company*, 2 Exch. 633; *Ryalls v. Bramall*, 1 Exch. 734.

(10) Com. Dig. "Admin," C. 3.

(11) *Watson v. Pilling*, 3 B. & B. 4.

(12) Pr. Reg. 351; *Rous v. Etherington*, 2 Lord Raym. 870.

be joined.⁽¹⁾ Where the declaration is against the executor or administrator personally, the latter must have signed a memorandum in writing within the Statute of Frauds,⁽²⁾ and there must have been some new and sufficient consideration for such promise.⁽³⁾ Where there is a misjoinder of counts, the defendants may demur, or move in arrest of judgment, or bring error; and the plaintiff may cure the error by assessing the damages separately on each count, and entering a *nolle prosequi* as to the bad counts.⁽⁴⁾

Form of Declaration against Executor or Administrator.

— } A. B. by P. A., his attorney, sues C. D., executor, &c.
to wit. } [or administrator, &c.] (see *ante*, p. 655), for money payable
by the said E. F. to the plaintiff, [or payable by the defendant as
executor (or administrator) as aforesaid to the plaintiff.]

Plea of non-joinder.]—If the defendant takes advantage of a non-joinder, he must plead in abatement, alleging that the co-executor non-joined is alive,⁽⁵⁾ and has administered.⁽⁶⁾ The plaintiff in such case may amend.⁽⁷⁾

Plea denying representative character.]—If the defendant denies his representative character, he must do so by a special plea,⁽⁸⁾ and must allege therein that he never administered.⁽⁹⁾ It is a personal plea, and one executor cannot plead that his co-defendant was never executor.⁽¹⁰⁾ If each of several defendants pleads *ne unques* executor, the plaintiff may enter a *nolle prosequi* as to the rest, and proceed against one.⁽¹¹⁾ The court has in special circumstances allowed the defendant to plead *ne unques* executor, and *plene administravit*.⁽¹²⁾

⁽¹⁾ *Waite v. Gale*, 2 D. & L. 925; *Corner v. Shew*, 3 M. & W. 350; *Kitchenman v. Skeel*, 3 Exch. 49.

⁽²⁾ 29 Car. 2, c. 3, s. 4.

⁽³⁾ *Forth v. Stanton*, 1 Wms. Saund. 210.

⁽⁴⁾ *Hayter v. Moat*, 2 M. & W. 56; *Corner v. Shew*, 4 M. & W. 163; *Kitchenman v. Skeel*, 3 Exch. 49.

⁽⁵⁾ *Hilbert v. Lewis*, 1 Freem. 268.

⁽⁶⁾ *Swallow v. Emberson*, 1 Lev. 161; *Rawlinson v. Shaw*, 3 T. R. 660; *Ryalls v. Bramall*, 1 Exch. 734.

⁽⁷⁾ See *post*, "Plea in abatement."

⁽⁸⁾ Rule Pl. 5 T. T. 1853, *ante*, p. 655.

⁽⁹⁾ 2 Wms. Exec. 1656 (4th edit.)

⁽¹⁰⁾ *Atkins v. Humphreys*, 2 C. B. 654.

⁽¹¹⁾ 1 Wms. Saund. 207 a, 336; *Griffiths v. Franklin*, M. & M. 148.

⁽¹²⁾ *Tyson v. Kendall*, 19 L. J. 434, Q. B.

Form of Plea of Ne Unques Executor.

The defendant by D. A. his attorney, says, that he is not executor [or administrator] as alleged.

The judgment, when such an issue is found for the defendant, is, that the plaintiff take nothing by his writ, and that the defendant go thereof without day.⁽¹⁾

Plea of plene administravit.]—Where the defendant pleads *plene administravit*, or *plene administravit præter*, he thereby admits that he is executor, and in the event of judgment against him will be liable to the extent of assets in hand,⁽²⁾ and if a *fi. fa.* issue *de bonis testatoris*, and no goods be found, this will be evidence of a *devastavit*.⁽³⁾ If each of several defendants pleads *plene administravit*, the plaintiff may succeed as to that one defendant only, who is found by the jury to have assets.⁽⁴⁾

Form of Plea of Plene Administravit and Plene Administravit Præter.

The defendant by D. A., his attorney, says, that he has fully administered all and singular the goods and chattels which were of the said E. F., deceased, at the time of his death, and which have ever come to the hands of the defendant as executor [or administrator], as aforesaid, to be administered, [in *plene administravit præter*, add, except goods and chattels of the value, to wit, of the sum of £] and that he the defendant hath not, nor at the time of the commencement of this suit, nor at any time since, had any goods or chattels which were of the said E. F., deceased, at the time of his death, in the hands of the defendant as executor [or administrator], as aforesaid, to be administered, [in *plene administravit præter*, add, except the said goods and chattels of the value aforesaid.]

The executor may pay away all the assets to satisfy simple contract debts, and, when an action on a covenant in a lease to indemnify against a future breach is brought, may plead *plene administravit*.⁽⁵⁾

Replication to such plea.]—When the plea of *plene administravit* is pleaded, the plaintiff may take issue on

(1) *Scott v. Wedlake*, 7 Q. B. 766; *Wood v. Kerry*, 2 C. B. 515.

(2) *Yardley v. Arnold*, Car. & M. 434; *Stroud v. Danbridge*, 1 C. & K. 445.

(3) 1 Wms. Saund. 219 b.; *Leonard v. Simpson*, 2 Bing. N. C. 176.

(4) *Parsons v. Hancock*, M. & M. 330; *Cousins v. Paddon*, 2 C. M. & R. 558.

(5) *Collins v. Crouch*, 13 Q. B. 542.

that plea, or take at once, without going to trial, a judgment of *quando acciderint*, as after mentioned. If he take issue, he must be prepared to prove assets in the defendant's hands; and if he prove some, but not sufficient, assets, he may have judgment for that amount,⁽¹⁾ and as to the remainder, he may have judgment of *quando acciderint*, and for costs. If he prove no assets, he cannot have judgment of *quando acciderint*,⁽²⁾ and must pay costs.⁽³⁾ Where one executor pleaded that a co-executor had assets in hand, whereby the debt sued for was extinguished, this was held to put in issue only legal and not equitable assets.⁽⁴⁾

Confessing action.]—An executor or administrator having the election of paying any one debt before another of the same degree, if two creditors bring actions at the same time, he may confess the action of one, and suffer judgment by default, and then plead the judgment recovered against the other plaintiff.⁽⁵⁾ But if an action is brought by one creditor, the executor cannot voluntarily pay other creditors of the same class who have not brought an action, in order to defeat the former's remedy.⁽⁶⁾ If one of several executors give a warrant of attorney against all the executors, the court will order it to be delivered up.⁽⁷⁾

Judgment.]—If the defendant has pleaded *plene administravit* or *plene administravit præter*, and the plaintiff think it safer not to take issue, but to confess the plea, he is then entitled to sign judgment of assets *in futuro* or of *quando acciderint* without the costs of a trial.⁽⁸⁾ A writ of inquiry or reference to the Master may then be had, as in other cases, and a *scire facias* must be sued out in order to reach any assets that come to the hands of the executor or administrator.⁽⁹⁾ This judgment of *quando acciderint* embraces not only the assets received by the executor after it is signed, but also such assets as come into, or ought to be in, his hands between the issuing of the writ or the plea and the judgment, in the due course of administration.⁽¹⁰⁾

(1) *Jackson v. Bowley*, Car. & M. 97.

(2) 2 Wms. Saund. 216 a. (1.)

(3) 2 Wms. Exec. 1690 (4th edit.)

(4) *Love v. Peskett*, 16 C. B. 500.

(5) *Lyttelton v. Cross*, 3 B. & C. 317; *Prince v. Nicholson*, 5 Taunt. 665.

(6) Com. Dig. "Admin." C. 2.

(7) *Elwell v. Quash*, 1 Str. 20.

(8) *Mara v. Quin*, 6 T. R. 1.

(9) *Smith v. Tateham*, 2 Exch. 205; C. L. P. Act. 1854, s. 91.

(10) *Smith v. Tateham*, 2 Exch. 205.

Form of Judgment of Quando Acciderint on a Plea of Plene Administravit.

And hereupon on _____, [day of signing judgment] the plaintiff inasmuch as the defendant doth not deny the action of the plaintiff, and inasmuch as the plaintiff cannot deny, but that the defendant had not any goods and chattels which were of the said E. F. at the time of his death, in his hands to be administered, as the defendant hath above in his said plea alleged, and admits the said plea to be true, prays judgment for the said debt, together with his costs of suit to be adjudged to him, to be levied of the goods and chattels which were of the said E. F. at the time of his death, and which shall hereafter come to the hands of the defendant to be administered. Therefore, it is considered, that the plaintiff do recover against the defendant the said £ _____, and £ _____ for his costs of suit, to be levied of the goods and chattels which were of the said E. F. at the time of his death, and which shall hereafter come to the hands of the defendant as executor [or administrator], as aforesaid, to be administered, [if the plea is plene administravit præter, add, "after satisfying the moneys due and owing on," &c. stating the grounds mentioned in the plea,] &c.

Form of Judgment of Quando Acciderint where part is for Assets in Futuro.

_____ to be levied as to £ _____, part thereof of the said goods and chattels, so as aforesaid acknowledged to be in the hands of the defendant, to be administered, and as to the residue thereof to be levied of other goods and chattels which were of the said E. F. at the time of his death, and which shall hereafter come to the hands of the defendant as executor [or administrator], as aforesaid, to be administered, &c.

"Proceedings against executors upon a judgment of assets *in futuro* may be had and taken in the manner provided by the C. L. P. Act, 1852, as to writs of revivor."⁽¹⁾

Costs.—Where the defendant admits his representative character, and fails upon some other issue than *plene administravit*, the judgment is, that the debt, damages, and costs be levied out of the goods of the deceased, if there are such, and, if not, the costs be levied out of the executor's own goods, *i.e. de bonis propriis*.⁽²⁾ So, on judgment by default, the defendant is liable to costs *de bonis propriis*.⁽³⁾ If the defendant plead a plea false to his own knowledge, and fail at

⁽¹⁾ C. L. P. Act, 1854, s. 91; see *post*, "Revivor."

⁽²⁾ 1 Wms. Saund. 335; *Howard v. Jemmett*, 1 W. Bl. 400; *Mounson v. Bourn*, Cro. Car. 518.

⁽³⁾ *Smith v. Tateham*, 2 Exch. 207.

the trial, he is liable to pay not only the costs, but the damages also *de bonis propriis*; but if he pleads a plea, although not false to his own knowledge, and the plaintiff obtains a verdict, the latter is entitled to judgment for the whole in the first instance *de bonis testatoris*, and if there are not assets, then to the costs *de bonis propriis* of the executor.⁽¹⁾ The defendant, therefore, in pleading any general plea runs the risk of paying the costs; whereas, if he only plead *plene administravit*, or having some assets in hand plead *plene administravit præter*, the costs on the judgment of *quando acciderint* will be *de bonis testatoris* only.⁽²⁾ The defendant, if likely to fail on the general plea, should apply to a judge for leave to withdraw it on payment of costs.⁽³⁾ If the defendant is liable as assignee, as for rent, repairs, &c., the judgment is *de bonis propriis*.⁽⁴⁾ Where the defendant succeeds on any issue upon a plea which goes to the whole cause of action, he is entitled as in ordinary cases to the general costs, though he may have pleaded the general issue and failed on it.⁽⁵⁾

Judgment de bonis testatoris si, &c., et si non, &c., de bonis propriis.

— to be levied of the goods and chattels, which were of the said E. F., at the time of his death, in the hands of the defendant as executor [or administrator], as aforesaid, to be administered, if he hath so much thereof in his hands to be administered; and if he hath not so much thereof in his hands to be administered, then £ being for the costs aforesaid, to be levied of the proper goods and chattels of the said defendant, &c.

Execution.]—When the judgment is, that the debt be levied out of the goods of the deceased, and, failing those, that the costs be levied out of the goods of the executor or administrator, the writ of execution issues in the first instance *de bonis testatoris*, and then, if the sheriff return *nulla bona testatoris nec propria*, and a *devastavit*, the usual writs of *f. fa.*, *ca. sa.*, or *elegit* may issue for the costs against the goods, person, or property of the executor or administrator himself. A *devastavit* must, however, always be returned

⁽¹⁾ Per Bayley, *J. Marshall v. Willder*, 9 B. & C. 658.

⁽²⁾ *De Tastet v. Andrade*, 1 Chit. R. 629, n.; *Cox v. Peacock*, 4 Dowl. 134; *Erving v. Peters*, 3 T. R. 685.

⁽³⁾ *Dearne v. Grime*, 2 W. Bl. 1275.

⁽⁴⁾ *Tilny v. Morris*, 1 Salk. 309; *Rubery v. Stevens*, 4 B. & Ad. 241; *Tremeere v. Morison*, 1 Bing. N. C. 19.

⁽⁵⁾ 2 Wms. Exec. 1691 (4th edit.)

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in such cases, before these latter writs can issue.⁽¹⁾ If the judgment is, that both debt and costs be levied out of the goods of the deceased, if any, and, failing these, out of those of the executor or administrator, which is the judgment in case of a plea being pleaded false to the knowledge of the defendant, then no previous return of the *devastavit* is necessary, but a *fi. fa.* issues *de bonis testatoris, et si non, &c., de bonis propriis*; and if the sheriff returns *nulla bona nec testatoris nec propria*, a *ca. sa.* may issue directly against the executor. Where the judgment was *de bonis testatoris*, and a *fi. fa.* has issued accordingly, if the sheriff has returned *nulla bona* only, this will be evidence of a *devastavit*.⁽²⁾ The plaintiff may then bring an action of debt on the judgment, stating in the declaration the judgment, the writ, and the return, and, if successful, he may then sue out execution directly against the goods or person of the defendant, as in ordinary cases. Or, instead of bringing an action on the judgment, the plaintiff may, after giving the same notice as in case of a writ of inquiry,⁽³⁾ sue out a *scire fieri* inquiry, which is a writ setting forth the *fi. fa.* and *nulla bona*, and suggesting that the executor has wasted the goods, and commanding the sheriff to inquire by a jury if this is so, and thereupon to warn the defendant to show cause why execution should not issue against his own goods.⁽⁴⁾ The defendant cannot plead either to the action on the judgment *de bonis testatoris*, or to the *scire fieri* inquiry, *plene administravit*,⁽⁵⁾ and he is liable to pay costs of the *sci. fi.*⁽⁶⁾

Form of fi. fa. on the Judgment (ante, p. 663.)

— you enter the same, and of the goods and chattels in your bailiwick, which were of E. F., deceased, at the time of his death, in the hands of C. D., executor of, &c. [or administrator of, &c.] to be administered, you cause to be made £ , which A. B., lately, &c., on which day the judgment aforesaid was entered up, if the said C. D. hath so much thereof in his hands to be administered, and if he hath not so much thereof in his hands to be administered, then that you omit not, by reason of any liberty of your county, but that you enter the same and cause to be levied of the proper goods and chattels of the

(1) *Ward v. Thomas*, 1 Cr. & M. 532; 2 Dowl. 87.

(2) *Leonard v. Simpson*, 1 Hodg. 251; *Cooper v. Taylor*, 7 Sc. N. R. 950; *Dawson v. Gregory*, 7 Q. B. 756.

(3) *Hiron v. Philips*, 1 Str. 235; *Ibid*, 623.

(4) See the form *Merchant v. Driver*, 1 Saund. R. 303; *Palmer v. Waller*, 1 M. & W. 689.

(5) 1 Wms. Saund. 219, c. d.; *Dawson v. Gregory*, 7 Q. B. 756.

(6) 3 & 4 Will. 4, c. 42, s. 34.

said C. D., in your bailiwick, the sum of 60*l*., parcel of the said 300*l*., and which 60*l*. was, by the said court, adjudged to the said A. B. for his costs of suit in that behalf : and have you these moneys with, &c.

Return of Sheriff of a Devastavit.

— but divers goods and chattels, which were of the said E. F., at the time of his death, to the value of 40*l*., after the death of the said E. F., came into the hands of the said C. D. to be administered, which said goods and chattels the said C. D. hath, before the coming of this writ, to me directed, eloigned, wasted and converted to his own use.

The answer of S. S., Sheriff.

Scire facias on a Judgment of Assets quando acciderint.

[Commence as usual and recite the judgment.] And although judgment be thereupon given, yet execution of the said £ still remains to be made to him, the said A. B. And after the judgment aforesaid, in form aforesaid, given, divers goods and chattels, which were of the said E. F., at the time of his death, to the value of the said £ , and more came and are now in the hands and possession of you, the said C. D., as executor [or administrator], as aforesaid, to be administered, whereof you may satisfy the said A. B. for the said £ , as by the information of the said A. B., in our said court, we have been given to understand. Wherefore the said A. B., having humbly besought us to provide him a proper remedy in this behalf, we command you that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our said court of Queen's Bench ["Common Pleas," or "Exchequer of Pleas"] at Westminster, to show cause why the said A. B. should not have execution against you of the said £ , together with interest upon the same, from the day of , on which day the judgment aforesaid was entered up, to be levied of the goods and chattels which were of the said E. F., at the time of his death, and which so as aforesaid came to and are now in the hands of you the said C. D., to be administered if it shall seem expedient for him, and further to do and receive what our said court shall then and there consider of you, the said C. D. in this behalf. And take notice, that in default of your appearing as aforesaid the said A. B. may proceed to execution.

Witness, at Westminster, the day of 18 .

CHAPTER V.

IDIOTS AND LUNATICS.

Plaintiffs.—An idiot must sue in person, but a lunatic may sue either in person or by attorney.⁽¹⁾ Where there is a committee, the action must nevertheless be brought in the name of the idiot or lunatic.⁽²⁾ If there is no committee, the wife of a lunatic has a sufficient implied authority to sue in his name.⁽³⁾ Where a person in a lucid interval sued his banker, the court refused to make the plaintiff give the defendant an indemnity on payment of the sum for which the action was brought.⁽⁴⁾

Defendants.—An idiot in an action brought against him shall appear in proper person, and he who pleadeth best for him shall be admitted.⁽⁵⁾ But a lunatic appears by attorney.⁽⁶⁾ Where a lunatic is in an asylum, and not allowed to be seen, service of the writ of summons was allowed to be made on the keeper of the asylum;⁽⁷⁾ and, where his wife carried on his business, one copy of the writ should also have been served on her.⁽⁸⁾ The court has, however, no power under the C. L. P. Act, 1852, s. 17, to allow the plaintiff to proceed as if personal service of the writ of summons had been effected, unless it can be made to appear that the writ

(1) Co. Litt. 135 b; *Beverley's case*, 4 Rep. 124.

(2) *Cocks v. Dayson*, Hob. 215; *Thorn v. Coward*, 2 Sid. 124.

(3) *Rock v. Slade*, 7 Dowl. 22.

(4) Tidd N. Pract. 265; *Williams v. Smith*, 1 Dowl. 632.

(5) *Beverley's case*, 4 Rep. 124.

(6) *Ibid.*; *Humphreys v. Griffiths*, 6 M. & W. 89.

(7) *Ibid.*; *Branson v Moss*, 6 M. & W. 420; 8 Dowl. 412. As to the service of a writ of ejectment in such cases, see *post*. *Banfield v. Darell*, 2 D. & L. 4. See also *Spiller v. Benson*, 12 M. & W. 425.

(8) *Limbert v. Hayward*, 2 D. & L. 406; *Mutter v. Foulkes*, 5 D. & L. 557.

has come to the defendant's knowledge, or that he wilfully evades service.⁽¹⁾ In cases where access to the lunatic or idiot is refused, the keeper should be informed that it is his duty to allow the writ to be served, otherwise the court may grant a *habeas corpus* to bring up the lunatic so that service may be effected.⁽²⁾

A lunatic or idiot may be arrested and held to bail as in ordinary cases, and the court will not discharge him on the ground of idiocy or insanity,⁽³⁾ or enter an *exoneretur* on the bail-piece.⁽⁴⁾

A lunatic or idiot may also be taken in execution by *ca. sa.* The wife has sufficient implied authority to apply for his discharge under the Small Debtors Act, 48 Geo. 3, c. 123.⁽⁵⁾

⁽¹⁾ *Holmes v Service*, 15 C. B. 293.

⁽²⁾ *Ridgway v. Cannon*, 23 L. T. 143, Q. B.

⁽³⁾ *Nutt v. Ferney*, 4 T. R. 121; *Kernott v. Norman*, 2 Id. 390; *Steel v. Alan*, 2 B. & P. 362.

⁽⁴⁾ *Ibotson v. Lord Galway*, 6 T. R. 133.

⁽⁵⁾ *Clay v. Bowler*, 6 N. & M. 814.

CHAPTER VI.

ALIENS AND FOREIGNERS, &c., OUT OF THE JURISDICTION.

Plaintiffs..]—An alien friend may sue in the courts here notwithstanding his alienage; but an alien enemy cannot do so unless resident here by the king's licence,⁽¹⁾ or unless the contract sued on were under the sanction of the crown, such as a trading licence.⁽²⁾ The plea of "alien enemy" must be specially pleaded.⁽³⁾ Where the right of action accrued to the plaintiff when residing beyond the seas, he may either sue while residing abroad, or within the same time after his return as is given by the Statute of Limitations in cases of plaintiffs constantly residing in this country. His executors, it seems, have the same time to sue; at all events they have six years after the plaintiff's death.⁽⁴⁾ In all cases where an alien permanently residing abroad, or a natural born subject residing in Scotland, Ireland, in the colonies, or anywhere out of the jurisdiction, brings an action, the court will order the plaintiff to give security for costs.⁽⁵⁾ When an alien or foreigner sues in the courts here, he thereby submits to the jurisdiction and practice of the courts; and hence the defendant may exhibit interrogatories to him under the C. L. P. Act, 1854, s. 51.⁽⁶⁾ The plaintiff is not compelled to sue in the county courts, and hence he is not within the statutes as to costs in such cases.⁽⁷⁾

(1) *Wells v. Williams*, 1 Salk. 46; *Casseres v. Bell*, 8 T. R. 166; Co. Litt. 129 b.; *Brandon v. Nesbitt*, 6 T. R. 23; *O'Mealey v. Wilson*, 1 Camp. 482.

(2) *Fenton v. Pearson*, 15 East, 419.

(3) *Harman v. Kingston*, 3 Camp. 153; *Alcenous v. Nigreu*, 4 E. & B. 217.

(4) 21 Jas. 1, c. 16, s. 7; *Townsend v. Deacon*, 3 Exch. 706.

(5) See *post*, "Security for Costs."

(6) *Pohl v. Young*, 26 L. T. 108, B. C.

(7) See *Sheils v. Raits*, 7 C. B. 116.

Defendants.]—Where the defendant is a British subject, and resides in Scotland or Ireland, he cannot be sued in this country, but the plaintiff can only sue him in the courts of Scotland or Ireland respectively. Where, however, the defendant is a British subject, and resides anywhere out of the jurisdiction, except in Scotland or Ireland, if the cause of action arose within this jurisdiction, he may be served with the writ of summons while abroad, and in certain cases judgment may be obtained, as stated *ante*, p. 105. And where a defendant so served has entered appearance, he cannot apply to the court afterwards to set aside the writ, and all subsequent proceedings, for he has attorned to the jurisdiction; but perhaps he might apply to set aside the appearance, if improvidently made.⁽¹⁾ Where the defendant resided abroad when the cause of action accrued, the plaintiff may bring the action any time within six years after the defendant's return; but if he chooses to sue the defendant before his return, he is not prevented from doing so.⁽²⁾

Foreign law.⁽³⁾]—When foreign law requires to be pleaded, it is not necessary to set out the law abstractedly, and then the facts, but it is enough to make general averments, stating substantially the ground of action or defence according to the foreign law.⁽⁴⁾ The mode of proving foreign law at the trial is not by producing copies of foreign law books, or statutes, or codes, but by calling witnesses who are experts, i. e. specially skilled in the law of the particular country.⁽⁵⁾ Where witnesses reside out of the jurisdiction, they may either be examined by commission or mandamus, or induced by consent and agreement to attend at the trial.⁽⁶⁾ Where the witness resides in Scotland or Ireland, he may be compelled by subpoena to attend the trial here, provided the leave of the court has been previously obtained, see *ante*, p. 264. The rule for this purpose is absolute in the first instance.⁽⁷⁾

⁽¹⁾ *Forbes v. Smith*, 10 Exch. 717.

⁽²⁾ *Ibid.* 11 Exch. 161.

⁽³⁾ Where a contract is made abroad to be enforced here, see as to the effect of the Statute of Frauds, and as to the law generally, *Leroux v. Brown*, 12 C. B. 801.

⁽⁴⁾ *Gould v. Webb*, 4 E. & B. 933.

⁽⁵⁾ *Sussex Peerage case*, 11 Cl. & Fin. 114; *Baron De Bode's case*, 8 Q. B. 208.

⁽⁶⁾ See *ante*, "Means of Evidence."

⁽⁷⁾ *Redman v. Broern*, 26 L. T. 79 Exch.

CHAPTER VII.

BANKRUPTS AND INSOLVENTS.

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| 1. Bankrupts and their assignees. | (a) Plaintiffs. | |
| (a) Plaintiffs. | (b) Defendants. | |
| (b) Defendants. | | |
| 2. Insolvents and their assignees. | | 3. Bankruptcy or insolvency during an action. |

1. BANKRUPTS AND THEIR ASSIGNEES.

(a) Plaintiffs.

Who to sue.—The adjudication of bankruptcy vests in the assignees the whole real and personal estate which the bankrupt had or was entitled to for his own benefit, either in possession, remainder, or reversion, as also all property which may come to him before his certificate; and the assignees must sue for the outstanding debts in their own names.⁽¹⁾ In general they may sue for all choses of action of the bankrupt, or breaches of contract committed before the bankruptcy, or on contracts completed by them after the bankruptcy.⁽²⁾ Where the cause of action, however, arises mainly from some injury or contract connected with the person, it is often a question of nicety whether, and to what extent, the right of action passes to assignees.⁽³⁾ Where a member of a partnership becomes bankrupt, the assignees

⁽¹⁾ Bankr. L. Cons. Act, 1849; 12 & 13 Vict. c. 106, ss. 141, 142.

⁽²⁾ *Whitmore v. Gilmour*, 12 M. & W. 808; *Hill v. Smith*, Id. 618; *Alder v. Keighley*, 15 M. & W. 107; *Gibson v. Carruthers*, 8 M. & W. 331.

⁽³⁾ *Drake v. Beckham*, 11 M. & W. 315; 2 H. L. C. 579; *Rogers v. Spence*, 13 M. & W. 571; 12 Cl. & F. 700; *Brewer v. Dew*, 11 M. & W. 625; 1 D. & L. 383; *Elliott v. Clayton*, 16 Q. B. 581; see also *Boddington v. Castelli*, 1 E. & B. 879.

may apply to the Court of Bankruptcy for authority to commence an action in the name of themselves and the other partner against any debtor of the partnership; but they must give notice to such other partner of the application, and, if necessary, indemnify him against payment of costs in respect of such action.⁽¹⁾ In all cases, where the assignees sue in right of the bankrupt, they must first apply to the Court of Bankruptcy for leave to do so, otherwise they will not be entitled out of the proceeds of the estate to be allowed any costs they may incur.⁽²⁾ If the bankrupt is uncertificated, when he enters into a contract, he may sue on it, subject to the right of the assignees to interfere; but he is, nevertheless, entitled to recover for his own personal labour, though the assignees may claim what does not come under that character.⁽³⁾ Where the goods are in "the order and disposition" of the bankrupt, the assignees must apply to the Court of Bankruptcy for an order to sell the same (such order specifying the particular goods to be sold)⁽⁴⁾ before they can sue for the goods; and, on obtaining the order, their title refers back to the date of the act of bankruptcy.⁽⁵⁾ The estate does not absolutely vest in the official assignee on an order being made under the arrangement clauses of 12 & 13 Vict. c. 106, s. 211, *et seq.*⁽⁶⁾

If assignees have not been appointed by the creditors, the official assignee may, it seems, sue in his own name.⁽⁷⁾ Where an action is brought in the name of the official assignee without his authority, he is entitled to be indemnified against the costs.⁽⁸⁾ When assignees are appointed by the creditors, all, including the official assignee, must join in the action;⁽⁹⁾ and the objection of nonjoinder in an action *ex contractu* should be taken not by plea in abatement, but

(1) 12 & 13 Vict. c. 106, s. 152.

(2) *Ibid.*, s. 153.

(3) *Herbert v. Sayer*, 5 Q. B. 965; *Williams v. Chambers*, 16 L. J., 230 Q. B.; *Crofton v. Poole*, 1 B. & Ad., 568; *Elliott v. Clayton*, 16 Q. B. 581.

(4) *Quartermaine v. Bittlestone*, 13 C. B. 133.

(5) *Heslop v. Baker*, 6 Exch. 740; 8 Exch. 411.

(6) *Lewis v. Collard*, 14 C. B. 208.

(7) *Dunn v. Hill*, 11 M. & W. 470; 2 Dowl. N. S. 1062; *Cannan v. South Eastern Railway Company*, 21 L. J. 257, C. P.; *Page v. Bauer*, 4 B. & Ald. 345.

(8) *Laws v. Bott*, 16 M. & W. 300; 4 D. & L. 559.

(9) *Snellgrove v. Hunt*, 1 Chit. R. 71; 2 Stark. 424; *Holland v. Phillips*, 10 A. & E. 149.

by way of traversing the allegation that the plaintiffs are assignees.⁽¹⁾

Writ of summons and declaration.]—The writ of summons need not describe the plaintiffs as assignees. The declaration is as in ordinary cases, and varies only in part of the

Form of Declaration.

— E. F., G. H., and O. A., assignees of the estate and effects of A. B., a bankrupt, according to the form of the statutes in force concerning bankrupts by P. A., their attorney, sue, &c. And the plaintiffs as such assignees claim £ , &c.

Affidavit to hold to bail.]—If the assignees find it necessary to hold the defendant to bail, the following is the

Form of Affidavit to hold to Bail.

In the Q. B., ["C. P." or "Exch. of P."]

Between E. F., G. H., and O. A., assignees of the estate and effects of A. B., a bankrupt, plaintiffs, and C. D., defendant.

I, E. F., of , one of the above-named plaintiffs, make oath and say that C. D., the above-named defendant, is justly and truly indebted to me and the above-named G. H. and O. A. as assignees of the estate and effects of the said A. B., a bankrupt, in £ , for [state cause of action], as appears by the books of the said A. B., and as I verily believe.

Defence.]—If the bankrupt sue in his own name on a cause of action which has passed to his assignees, the defendant must plead that the plaintiff is a bankrupt. Where, however, he sues on a contract entered into when an uncertificated bankrupt, a plea of the plaintiff's bankruptcy constitutes no defence, unless it contains an averment that the assignees have interfered.⁽²⁾ "In all actions by assignees of a bankrupt, the character in which they are stated on the record to sue shall not be considered as in issue, unless specially denied."⁽³⁾ Such a special plea puts in issue not merely the plaintiffs' appointment as assignees, but also

(1) *Jones v. Smith*, 1 Exch 831.

(2) *Herbert v. Sayer*, 5 Q. B. 965.

(3) Rule Pl. 5 T. T. 1853.

their title, i. e. the petitioning creditor's debt, the act of bankruptcy, and trading.⁽¹⁾

Notice of disputing the act of bankruptcy.—“In any action other than an action brought by the assignees for any debt or demand, for which the bankrupt might have sustained an action, had he not been adjudged bankrupt, and whether at the suit of or against the assignees, or against any person acting under the warrant of the court for anything done under such warrant, no proof shall be required at the trial of the petitioning creditor's debt, or of the trading, or act of bankruptcy, respectively, unless the other party in such action shall, if defendant, *at or before pleading*, and if plaintiff, *before issue joined*, give notice in writing to such assignee or other person that he intends to dispute some and which of such matters; and in case such notice shall have been given, if such assignees or other person shall prove the matter so disputed, or the other party admit the same, the judge before whom the case shall be tried may (if he think fit) grant a certificate of such proof or admission; and such assignees or other persons shall be entitled to the costs occasioned by such notice, and such costs shall, if such assignees or other person shall obtain a verdict, be added to the costs, and if the other party shall obtain a verdict, shall be deducted from the costs which such other party would otherwise be entitled to receive from such assignees or other person.”⁽²⁾ The notice here referred to must specify which of the above particulars the defendant means to dispute; for it is too general to say, he will dispute “the bankruptcy.”⁽³⁾ The notice must be given, notwithstanding defendant pleads a plea expressly disputing the bankruptcy.⁽⁴⁾ The notice should be delivered with the plea; and, if it has not been then or previously delivered, the defendant should apply to a judge at chambers for leave to withdraw the plea, that it may be re-delivered with the notice.⁽⁵⁾

(1) *Butler v. Hobson*, 4 Bing. N. C. 301; *Buckton v. Frost*, 1 P. & D. 102; 8 A. & E. 844.

(2) 12 & 13 Vict. c. 106, s. 234. The trial of a feigned issue is not within this clause, *Lott v. Melvill*, 3 Sc. N. R. 346, 9 Dowl. 882; but an action of ejectment by an assignee is, *Doe d. Johnson, v. Liversedge*, 11 M. & W. 517.

(3) *Trimley v. Unwin*, 6 B & C. 537; *Porter v. Walker*, 1 Sc. N. R. 568; *Hernaman v. Barber*, 15 C. B. 774; 14 C. B. 583.

(4) *Moore v. Raphael*, 7 C. & P. 115.

(5) *Folks v. Scadder*, 3 C. & P. 232; *Butcher v. Addison*, 1 Sc. N. R. 175.

Form of Notice of Intention to dispute Bankruptcy.[*Title of court and cause.*]

Take notice that the above-named defendant intends at the trial of this cause to dispute the petitioning creditor's debt, touching the alleged bankruptcy [or to dispute the act of bankruptcy, or trading] of the said A. B. D. A., &c.

The notice is properly served on the attorney for the assignees, or, it seems, even on a clerk of the assignee, at his countinghouse.⁽¹⁾

Payment into court in certain actions.—“If the assignees commence any action or suit for any money due to the bankrupt's estate, before the time allowed for the bankrupt to dispute the bankruptcy shall have elapsed, any defendant in any such action or suit shall be entitled, after notice given to the assignees, to pay the same or any part thereof into the court in which such action or suit is brought, and all proceedings with respect to the money so paid into court shall thereupon be stayed until such time shall have elapsed: and if within that time the bankrupt shall not have commenced such action, suit, or other proceedings as allowed by this act, and prosecuted the same with due diligence, the money shall be paid out of court to the official assignee, but otherwise shall abide the event of such action, suit, or other proceeding, and upon such event shall be paid out of court either to the official assignee or the person adjudged bankrupt, as the court shall direct; and, after such payment of money so made into court, it shall not be lawful for the person so adjudged bankrupt to proceed against the defendant for recovery of the same money.”⁽²⁾

Costs.—Where notice has been given of disputing the act of bankruptcy, &c., at the trial, as mentioned *ante*, p. 673, the assignees, on proving it and obtaining a certificate of the judge, are entitled to the costs of proof, whatever be the event of the trial. When the assignees obtain the leave of the Court of Bankruptcy to sue, the costs, to which they may be put, are allowed out of the estate of the bankrupt.⁽³⁾

(1) *Widger v. Browning*, 2 C. & P. 523; 1 M. & M. 27; *Howard v. Ramsbotham*, 3 Taunt. 526.

(2) 12 & 13 Vict. c. 106, s. 158.

(3) 12 & 13 Vict. c. 106, s. 153.

Where the bankrupt sues as nominal plaintiff for the benefit of an assignee, the defendant may require him to give security for costs, as to which see *post*, "Security for Costs."

Death or removal of assignee.]—"Whenever an assignee shall die or be removed, or a new assignee shall be chosen, no action at law or suit in equity shall be thereby abated, but the court, in which any action or suit is depending, may, upon the suggestion of such death, or removal and new choice, allow the name of the surviving or new assignee to be substituted in the place of the former, and such action or suit shall be prosecuted in the name or names of the said surviving or new assignee or assignees, in the same manner as if he had originally commenced the same."⁽¹⁾

(b) *Defendants.*

Proceedings by affidavit and summons in bankrupt court.]—Where a party proposed to be sued is a trader subject to the bankrupt laws, the creditor may, in the first instance, instead of bringing an action in the superior courts, proceed in the Bankrupt Court as follows. If any creditor of any such trader shall file an affidavit in the Court of Bankruptcy, in the district in which such trader shall reside, of the truth of his debt, and of the debtor, as he verily believes, being such trader, and of the delivery to such trader personally, or to some adult inmate at his usual or last known place of abode or business, of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof, it shall be lawful for the court in which such affidavit shall be filed to issue a summons in writing, "calling upon such trader to appear before such court, and stating in such summons the purpose for which such trader is called upon to appear as hereinafter provided; provided always, that, if the demand of the creditor appear by such affidavit to be due from two or more persons carrying on trade in partnership, the delivery of such account and notice to any one of the partners personally or to some adult inmate at his usual or last known place of abode or business, and also at the place of business of the firm as aforesaid, shall be sufficient to authorize the court to issue such summons against any other of such partners, as well as against the partner served personally with such account and

⁽¹⁾ 12 & 13 Vict. c. 106, s. 157.

notice."⁽¹⁾ On the trader's appearance the Court of Bankruptcy requires him to admit in writing the whole or part of such debt, or to make a deposition that he has a good defence on the merits, in which case the court may require him to enter into a bond with sureties to pay the costs incurred in any action.⁽²⁾ If the trader do not attend, having no excuse, or attending refuse to admit the debt, or to depose to having a defence on the merits, and within seven days of the service he refuse to pay or compound or give a bond, he thereby commits an act of bankruptcy.⁽³⁾ So, it is an act of bankruptcy, if, after signing an admission of the debt, he fail to pay in seven days.⁽⁴⁾ An attorney must be present on behalf of the trader to attest his admission of the debt.⁽⁵⁾

Costs in action after filing affidavit in bankruptcy.—
 "Where any such trader, against whom an affidavit of debt is filed by any creditor as aforesaid, shall be summoned to appear before the Court of Bankruptcy in which such affidavit shall be filed, every such creditor or trader shall have such costs as the court in its discretion shall think fit, or the court may direct the costs of either party, of or incident to, or attendant upon, such affidavit and summons, to abide the event of any action which shall have been brought, or shall thereafter be brought, for the recovery of such demand, or any part thereof, and in such case such costs shall be costs in the cause, and recovered under the judgment and execution in such action."⁽⁶⁾ When the costs of the proceedings in bankruptcy are ordered to abide the event of the action, they may, after the determination of the action, be taxed by the officer of the Bankruptcy Court, and

(1) 12 & 13 Vict., c. 106, s. 78. The affidavit must be made by the creditor himself in person (*Ex parte Hall*, 3 Deac. R. 405), and must state the nature of the debt with the same degree of certainty and precision as an affidavit to hold to bail: (Rule Bank. C. 72.) Where the plaintiff sued the defendant on a bill of exchange, and also proceeded against him by affidavit in bankruptcy, but a judge at chambers stayed the action on payment of debt and costs, it was held, the plaintiff had no right to keep the bill, until the costs in bankruptcy were paid: *Cornes v. Taylor*, 10 Exch. 441.

(2) *Ibid.* s. 79.

(3) *Ibid.* s. 80; see also *Pennell v. Rhodes*, 9 Q. B. 114; *Oldfield v. Dodd*, 8 Exch. 578.

(4) *Ibid.* ss. 81, 82.

(5) *Ibid.* s. 84. The forms applicable to such proceedings in the Bankruptcy Court are all given in the schedules (F. to L.) of 12 & 13 Vict. c. 106.

(6) 12 & 13 Vict. c. 106, s. 85.

added to the costs of the action, and final judgment may be signed for the whole.⁽¹⁾

“In every action, where any such creditor is plaintiff, and any such trader is defendant, and wherein the plaintiff shall not recover the full amount of the sum for which he shall have filed an affidavit of debt as aforesaid, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought, provided that it shall be made to appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not any reasonable or probable cause for making such affidavit of debt in such amount as aforesaid, and provided such court shall thereupon by rule or order direct that such costs shall be allowed to the defendant; and the plaintiff shall, upon such rule or order being made, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed (and then in such sum only as the same shall exceed) the amount of the taxed costs of the defendant in such action; and in case the sum recovered in any such action shall be less than the amount of the costs to be taxed as aforesaid of the defendant, then the defendant shall be entitled, after deducting the sum of money recovered by the plaintiff in such action from the amount of the costs so to be taxed, to take out execution for such costs in like manner as a defendant may now by law have execution for costs in other cases.”⁽²⁾

The defendant's costs under this section are to be deducted from the debt or damages recovered by the plaintiff, and not from the debt or damages and the plaintiff's costs added together; and upon the defendant's application for his costs, the date of the commencement of the action is sufficiently shown by the statement of the writ of summons in the issue delivered by the plaintiff, without any express averment to that effect upon the affidavit.⁽³⁾ The defendant must apply under this section before judgment signed, or within the time allowed for a new trial;⁽⁴⁾ and he is not disqualified from applying by having agreed to a reference at *Nisi Prius*.⁽⁵⁾

⁽¹⁾ *Webb v. Hewlett*, 6 Exch. 107; 2 L. M. & P. 4.

⁽²⁾ 12 & 13 Vict. c. 106, s. 86.

⁽³⁾ *Deere v. Kirkhouse*, 1 L. M. & P. 783.

⁽⁴⁾ *Smith v. Temperley*, 16 M. & W. 273.

⁽⁵⁾ *Deere v. Kirkhouse*, 1 L. M. & P. 783.

The affidavit in bankruptcy should be for the balance only, after deducting any set-off which may be available against the creditor ; otherwise, if he recover less than what is sworn to, this may show there was no reasonable cause for the affidavit.⁽¹⁾ But a mere miscalculation on the face of the affidavit will not be held to show want of reasonable cause.⁽²⁾

Actions against assignees.]—The assignees, when sued, need not be described as such, either in the writ, or commencement of the declaration. They are not liable on any contract entered into by the bankrupt, unless they adopt it : and, where the contract is unexecuted at the time of the bankruptcy, they may elect to complete it or not, according as it is likely to be beneficial or not to the estate, unless it is one which is so exclusively personal to the bankrupt, as by depending on his skill or taste, that it does not vest in them.⁽³⁾ The assignees have also express power to accept or decline a lease held by the bankrupt,⁽⁴⁾ or an agreement to buy an estate ; ⁽⁵⁾ and therefore may be sued thereon or not, as the case may be. They cannot be sued for a dividend by a creditor who has proved ; he can only petition the court, if refused payment.⁽⁶⁾ If any assignee, having funds of the estate, himself become bankrupt, and obtain his certificate, this will only protect his person, but not his future effects from being liable to make up the deficiency.⁽⁷⁾ If an action be brought against the official assignee for an act done by him within the scope of his duties, a judge of the court may set aside the proceeding on application.⁽⁸⁾ The assignees, with the leave of the Court of Bankruptcy first obtained, but not otherwise, may defend any action which the bankrupt himself might have defended ; and in such case the costs, to which they may be put in respect of such action, shall be allowed out of the proceeds of the estate and effects of the bankrupt.⁽⁹⁾

⁽¹⁾ *Marshall v. Sharland*, 15 Q. B. 1051 ; see also *Smith v. Temperley*, 16 M. & W. 273.

⁽²⁾ *Wilding v. Temperley*, 11 Q. B. 987.

⁽³⁾ *Drake v. Beckham*, 11 M. & W. 315.

⁽⁴⁾ 12 & 13 Vict. c. 106, s. 145.

⁽⁵⁾ *Ibid.* s. 146.

⁽⁶⁾ *Ibid.* s. 190.

⁽⁷⁾ *Ibid.* s. 156.

⁽⁸⁾ *Ibid.* s. 41 ; *Wearing v. Smith*, 9 Q. B. 1024 ; *Clark v. Smith*, 3 C. B. 982.

⁽⁹⁾ *Ibid.* s. 153.

When an action is brought against the assignees for anything "done in pursuance of the act," it must be within three months next after the commission of the fact. Things done "in pursuance of the act," mean where the assignee founds his act on the power given him by the statute.⁽¹⁾

Proof of act of bankruptcy, &c.—In actions against assignees, the plaintiff, if intending at the trial to dispute the trading, act of bankruptcy, or petitioning creditor's debt, must, *before issue joined*, give notice of such intention.⁽²⁾ Service of this notice at the time of delivering the issue is too late,⁽³⁾ unless the defendant's attorney waived earlier service.⁽⁴⁾

Actions against bankrupt.—No execution on a judgment obtained against the bankrupt before bankruptcy is good, unless the seizure and sale of the goods took place before the filing of the petition for adjudication.⁽⁵⁾ And if notice, however short, of an act of bankruptcy, be served on the attorney before seizure, the execution is defeated, though the notice be served in London, and the writ has been sent into a bailiwick in the country; but the notice must be served on the attorney himself, or on his managing clerk attending to the specific matter, or communicating it to the principal.⁽⁶⁾ Where a judgment creditor has served an attachment order on the garnishee within the C. L. P. Act, 1854, s. 64, before bankruptcy, he thereby becomes a creditor having a security for his debt, but not having a lien within the Bankrupt Act.⁽⁷⁾

A bankrupt cannot be held to bail after he has obtained his certificate, nor before that event while going to surrender, nor where he has obtained an indorsement of protection on his summons from time to time, in order to attend his examination before the Court of Bankruptcy.⁽⁸⁾

The certificate of conformity discharges the bankrupt

⁽¹⁾ *Edge v. Parker*, 8 B. & C. 697.

⁽²⁾ See *ante*, p. 673.

⁽³⁾ *Richmond v. Heapy*, 4 Camp. 207.

⁽⁴⁾ See *Folks v. Scudder*, 3 C. & P. 232.

⁽⁵⁾ 12 & 13 Vict. c. 106, s. 184; *Hutton v. Cooper*, 6 Exch. 159; 2 L. M. & P. 104.

⁽⁶⁾ *Ibid.* s. 133; *Pike v. Stephens*, 12 Q. B. 465; see also *Pennell v. Stephens*, 7 C. B. 987.

⁽⁷⁾ 12 & 13 Vict. c. 106, s. 184; *Holmes v. Tutton*, 5 E. & B. 65.

⁽⁸⁾ See *post*, "Bail."

from all debts due to him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy; but it does not discharge any person jointly bound with the bankrupt.⁽¹⁾ Hence, if the bankrupt be sued in such cases, he may plead in general that the cause of action accrued before he became bankrupt, and may give the Bankrupt Act and the special matter in evidence.⁽²⁾ Where, however, the bankrupt had given a blank promissory note to a creditor long before the bankruptcy and certificate, which note was filled up thereafter and passed to an innocent indorsee, it was held the certificate was no bar to the action on the note.⁽³⁾

Form of plea of Bankruptcy.

— that the defendant became a bankrupt within the true intent and meaning of the statutes in force concerning bankrupts, and that the causes of action accrued to the plaintiff before the defendant so became a bankrupt.

Where the bankrupt has not obtained his certificate, he may be sued for all debts or demands which are not proved under his bankruptcy, provided a complete cause of action has accrued; ⁽⁴⁾ and the courts of law will not inquire on what grounds such certificate has been refused.⁽⁵⁾ Moreover, his assignees are in the position of judgment creditors in respect of the total amount of the debts due from the bankrupt, and any creditor is in the position of a judgment creditor in respect of his claim, when it has been admitted. And the Court of Bankruptcy, “when it shall have refused to grant the bankrupt any further protection, or shall have refused or suspended his certificate, shall, on the application of such assignees or of any such creditor, grant a certificate under the seal of the court, and every such certificate shall have the effect of a judgment, entered up in one of Her Majesty’s Superior Courts of Common Law at Westminster, until the allowance of the certificate; and such assignees or creditor may thereupon issue and enforce a writ of execution against the bankrupt, and the production of any such certificate to the proper officer of any such superior court shall

⁽¹⁾ 12 & 13 Vict. c. 106, s. 200.

⁽²⁾ *Ibid.* s. 205.

⁽³⁾ *Temple v. Pullen*, 8 Exch. 389.

⁽⁴⁾ See *Augarde v. Thompson*, 2 M. & W. 617; *Walker v. Pilbeam*, 4 C. B. 229.

⁽⁵⁾ *Re Cowgill*, 16 Q. B. 336.

be sufficient authority to him to issue and seal such writ, provided such certificate shall be deemed cancelled by the allowance of the certificate of conformity, and no execution shall be issued or shall affect any estate or effects acquired by the bankrupt after such allowance of the certificate of conformity."⁽¹⁾ When the bankrupt is taken in execution on the certificate above stated, he will not be discharged until a year expire, unless the Court of Bankruptcy otherwise order.⁽²⁾ A writ of execution cannot be enforced after the certificate has come into operation.⁽³⁾ If an extent has issued against the bankrupt for a crown debt, on the same day as adjudication of bankruptcy has passed, the title of the Crown prevails.⁽⁴⁾ Where one of several proposed defendants is a bankrupt or insolvent, the proper course is not to join him as a defendant, but to reply to any plea of abatement as to the nonjoinder, that such person has been discharged by bankruptcy and certificate, or under an Act for the Relief of Insolvent Debtors.⁽⁵⁾ Where one of the defendants pleads bankruptcy, the plaintiff should enter a *solle prosequi* as to him, and proceed against the rest,⁽⁶⁾ the plaintiff being liable for such defendant's costs.⁽⁷⁾

Election of remedy by creditor.—“No creditor who has brought any action or instituted any suit against any bankrupt in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the bankruptcy, shall prove a debt under such bankruptcy or have any claim entered upon the proceedings, without relinquishing such action or suit; and the proving or claiming a debt, under a *fiat* or petition for adjudication of bankruptcy by any creditor, shall be deemed an election by such creditor to take the benefit of such *fiat* or petition with respect to the debt so proved or claimed, provided that such creditor shall not be liable to the payment to such bankrupt or his assignees of the costs of such action or suit so relinquished by him; and that where any such creditor shall have brought any action or suit against such bankrupt jointly with any other person or persons, his relinquishing such action or suit against the bankrupt shall not affect such

⁽¹⁾ 12 & 13 Vict. c. 196, s. 257.

⁽²⁾ *Ibid.* s. 259.

⁽³⁾ *Re Everard*, 6 Exch. 111.

⁽⁴⁾ *Edwards v. Reginam*, 9 Exch. 628.

⁽⁵⁾ 3 & 4 Will. 4, c. 42, s. 9.

⁽⁶⁾ *Noke v. Ingham*, 1 Wils. 89.

⁽⁷⁾ 3 & 4 Will. 4, c. 42, s. 32.

action or suit against such other person or persons; provided also, that any creditor, who shall have so proved or claimed, if the fiat or petition for adjudication be afterwards superseded or dismissed, may proceed in the action as if he had not so proved or claimed, and in bailable actions shall be at liberty, under the authority of a judge's order, for that purpose obtained, in like manner as may now by law be done, to arrest the defendant *de novo*, if he has not put in bail below or perfected bail above, or if the defendant has put in or perfected such bail, to have recourse against such bail by requiring the bail below to put in and perfect bail above, within the first eight days in term after notice in the *London Gazette* of the first superseding or dismissing of such fiat or petition, and by suing the bail upon their recognizance if the condition thereof is broken."⁽¹⁾ Proving for part of the debt has the same effect within this section as proving for the whole.⁽²⁾ But where two debts are due in distinct rights, proving for one leaves the other unaffected.⁽³⁾ It is enough that the plaintiff has entered a claim, though the proof is not completed.⁽⁴⁾ His being the petitioning creditor does not, it seems, determine the election;⁽⁵⁾ nor does the appointment of the plaintiff as assignee.⁽⁶⁾ The creditor need not formally discontinue the action before the proof.⁽⁷⁾ If he bring or proceed with the action after having proved, the court will, on application, stay it, or the Court of Bankruptcy will expunge the proof.⁽⁸⁾ Nor can the defendant insist on a suggestion of the fact of proof being made on the record.⁽⁹⁾

2. Insolvents and their Assignees.

(a) Plaintiffs.

When a vesting order of the Court for the Relief of Insol-

⁽¹⁾ 12 & 13 Vict. c. 106, s. 182.

⁽²⁾ *Sainter v. Ferguson*, 8 C. B. 619; *Woodward v. Meredith*, 2 D. & L. 135; *Geikie v. Hewson*, 5 Sc. N. R. 618; 4 M. & Gr. 618.

⁽³⁾ *Harley v. Greenwood*, 5 B. & Ald. 95; *Bridgett v. Mills*, 4 Bing. 18; *Ex parte Schesinger*, 2 Gl. & J. 392.

⁽⁴⁾ *Ball v. Bowden*, 22 L. J. 249, Ex.; *Augarde v. Thompson*, 2 M. & W. 617.

⁽⁵⁾ *Eicke v. Nokes*, 1 Bing. N. C. 69; but see *Ex parte Ward*, 1 Atk. 153.

⁽⁶⁾ *Ex parte Ward*, 1 Atk. 153.

⁽⁷⁾ *Adames v. Bridger*, 8 Bing. 314; 1 M. & Sc. 438.

⁽⁸⁾ *Woodward v. Meredith*, 2 D. & L. 135; *Harley v. Greenwood*, 5 B. & Ald. 106. But see *Ransford v. Barry*, 7 Dowl. 807.

⁽⁹⁾ *Sainter v. Ferguson*, 8 C. B. 619; *Kemp v. Potter*, 6 Taunt. 549.

vent Debtors under 1 & 2 Vict. c. 110, s. 37, is made, it operates as a transfer to the provisional assignee, and afterwards to assignees appointed by the court, of all the real and personal estate of the insolvent (except wearing apparel, &c., to the value of 20*l.*), and all his future estate, right, title and interest in any real or personal estate to be acquired. The assignees may, with the leave of the court, sue in his or their own name to recover the effects of the insolvent.⁽¹⁾ New assignees may be appointed by the court, and no action abates by death or removal; but the court in which the action is brought may, on suggestion thereof, allow the names of the new assignees to be substituted.⁽²⁾ Where the insolvent has sold and delivered goods to a party between the vesting order and the final discharge, the insolvent cannot sue for the price,⁽³⁾ if the assignee interfere.⁽⁴⁾ Where an insolvent, after a vesting order has been made on his own petition, is discharged without adjudication, by the default or consent of creditors, and sues a party detaining goods which came to the provisional assignee before the discharge, no order of the Insolvent Court having been made for delivering them, it seems, whether or not the property re-vested in the insolvent by such discharge, the action cannot be brought against a person acting by authority of the provisional assignee, though the authority was not given till after the discharge.⁽⁵⁾ But, as in the case of a bankrupt, where the cause of action is exclusively personal, the assignee cannot sue, but the insolvent only; as for work and labour done by the insolvent in person.⁽⁶⁾ So, a diploma conferring a degree of doctor of medicine does not pass to the assignees.⁽⁷⁾ So, where an insolvent had been, by the negligence of his attorney, imprisoned and put to expense to obtain his release, the cause of action against the attorney was held not to pass to the assignees.⁽⁸⁾ In general a right of action, *ex contractu*, vested in the insolvent previous to the petition or vesting order, is thereupon

(1) 1 & 2 Vict. c. 110, ss. 42, 45; *Miles v. Pope*, 5 C. B. 294.

(2) *Ibid.* ss. 53, 65.

(3) *Ford v. Dabbs*, 6 Sc. N. R. 193.

(4) *Jackson v. Burnham*, 8 Exch. 173.

(5) *Kernott v. Pittis*, 2 E. & B. 406.

(6) *Williams v. Chambers*, 10 Q. B. 337; see *Stanton v. Collier*, 3 E. & B. 274; *Wetherell v. Julius*, 10 C. B. 267. See *ante*, p. 671.

(7) *Kernott v. Cattlin*, 2 E. & B. 790.

(8) *Wetherell v. Julius*, 10 C. B. 267.

transferred to the assignee.⁽¹⁾ Where, however, a bond or debt has been assigned by the insolvent before insolvency, and notice of the assignment given to the debtor, the insolvent must sue as trustee for the assignee.⁽²⁾

Where a trader owes less than 300*l.*, or another person not a trader becomes insolvent, he may present a petition to the Insolvent Court in the mode pointed out by 5 & 6 Vict. c. 116, s. 14, and all his estate and effects become vested in the official assignee as if such person were bankrupt. The official assignee then may, immediately on his appointment, sue for debts due to the insolvent; and it is a good plea in bar to an action by the insolvent in such a case, that the petition has been presented, protection granted, and an assignee appointed.⁽³⁾ When an assignee is appointed by the creditors, then he must join with the official assignee in suing;⁽⁴⁾ and no action abates by reason of the death, removal, or new appointment of an assignee.⁽⁵⁾

Where, under the Arrangement between Debtors and Creditors Act,⁽⁶⁾ a resolution and agreement of the creditors has been filed, the estate and effects of the petitioning debtor vest in the trustee only so far as such debtor has expressly given them up;⁽⁷⁾ and therefore the plea must show, that the creditors resolved that a trustee should be appointed, and that the particular debt should vest in him.

The defendant must plead specially that the plaintiffs are not assignees.⁽⁸⁾ If the plaintiff reply *nil debet* to a plea of set-off, he cannot at the trial give in evidence his discharge under the Insolvent Debtors Act;⁽⁹⁾ he should have replied such matter specially.⁽¹⁰⁾

(1) *Swann v. Sutton*, 10 A. & E. 631.

(2) *Buck v. Lee*, 1 A. & E. 804; *Boyd v. Mangles*, 3 Ex. 387. See also *Trott v. Smith*, 12 M. & W. 703; *D'Arney v. Chesneau*, 13 M. & W. 796.

(3) *Sayer v. Dufaur*, 5 D. & L. 313, which gives a form of the plea.

(4) 7 & 8 Vict. c. 96, s. 10.

(5) *Ibid.* s. 16.

(6) 7 & 8 Vict. c. 70.

(7) *Ibid.* s. 7; *Chilcott v. Kemp*; *Robins v. Hobbs*, 9 Hare, 122; 3 Exch. 514.

(8) Rule Pl. 5 T. T 1853, *ante* p. 655.

(9) 1 & 2 Vict. c. 110, s. 91.

(10) *Ford v. Dornford*, 8 Q. B. 583.

Form of Writ of Summons.

— E. F. and G. H., assignees of the estate and effects of A. B., an insolvent debtor, according to the statutes in force for the relief of insolvent debtors in England.

Form of Declaration by Assignees of Insolvent discharged under 1 & 2 Vict. c. 110.

— *to wit.* E. F. and G. H., assignees of the estate and effects of A. B., an insolvent debtor, and heretofore discharged as such under and according to the statutes in force for the relief of insolvent debtors in England, by P. A. their attorney, sue C. D. for money payable by the defendant to the said E. F., before [or after] he was divested of his estate and effects under the said statutes.

Where the insolvent sues as nominal plaintiff for the benefit of an assignee, the defendant may require him to give security for costs, as to which see *post*, "Security for costs."

(b) Defendants.

An insolvent is discharged from those particular debts only which are set forth in his schedule to be due to the creditors there mentioned.⁽¹⁾ He is not expressly discharged even from these so as to exclude every mode of obtaining satisfaction.⁽²⁾ The insolvent may, however, be sued for damages which were not ascertainable at the time of his discharge.⁽³⁾ Previous to his discharge the insolvent must execute a warrant of attorney to his assignees, that they may enter up judgment on which execution may be issued without a *scire facias* against his after-acquired property,⁽⁴⁾ and he cannot be imprisoned thereon.⁽⁵⁾ The insolvent, when sued on a cause of action inserted in the schedule, may plead his discharge generally.⁽⁶⁾

Form of Plea of Insolvency.

— that by an order made by the Court for the Relief of Insolvent Debtors, according to the statute made and passed in the session of Parliament held in the first and second years of the reign of Her Majesty,

⁽¹⁾ *Leonard v. Baker*, 15 M. & W. 202. As to the effect of a mistake in the description of the debt in the schedule, see sect. 93. *Hoyles v. Blore*, 14 M. & W. 387; *Maile v. Bays*, 2 D. & L. 964; *Brown v. Thompson*, 17 C. B. 245.

⁽²⁾ *Francis v. Dodsworth*, 4 C. B. 202.

⁽³⁾ *Allard v. Kimberley*, 12 M. & W. 410.

⁽⁴⁾ 1 & 2 Vict. c. 110, ss. 75, 87.

⁽⁵⁾ *Ibid.* s. 90.

⁽⁶⁾ *Ibid.* s. 91. Where one of several defendants is an insolvent, see the proper course for the plaintiff to pursue, *ante*, p. 68.

for the relief of insolvent debtors in England, he was duly discharged of and from the said causes of action.

If he has obtained a final order of protection under 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, he may plead in bar that the petition was duly presented, and a final order for protection and distribution of his effects made by a commissioner duly authorized.⁽¹⁾ The plea must not only show that the debt was contracted before the date of filing the petition, but also that it was inserted in the schedule.⁽²⁾

3. *Bankruptcy or Insolvency occurring during Action.*

Plaintiff.]—"The bankruptcy or insolvency of the plaintiff, in any action which the assignees might maintain for the benefit of the creditors, shall not be pleaded in bar to such action, unless the assignees shall decline to continue and give security for the costs thereof, upon a judge's order to be obtained for that purpose, within such reasonable time as the judge may order, but the proceedings may be stayed until such election is made; and in case the assignees neglect or refuse to continue the action, and give such security within the time limited by the order, the defendant may, within eight days after such neglect or refusal, plead the bankruptcy."⁽³⁾ This section does not apply to actions commenced after the insolvency of the plaintiff, and the non-interference of the assignees is immaterial where the cause of action accrues before the insolvency.⁽⁴⁾ When the bankruptcy is properly pleaded, the assignees must commence the action *de novo*, in their own names.⁽⁵⁾ When no such plea is pleaded, the assignees may allow the action to go on to judgment and then make themselves parties to it.

Defendant.]—If the defendant obtains his discharge after the writ issued, he should plead it *puis darrein continuance*; or, if unable to do so, the court will, on motion, stay the proceedings.⁽⁶⁾ The plaintiff in such circumstances may prove the debt in bankruptcy, in which event he will discontinue the action, as to which see *ante*, p. 681.

⁽¹⁾ See *Jacobs v. Hyde*, 2 Exch. 508. As to the form of the plea see also *Cook v. Henson*, 1 C. B. 908; *Laurie v. Bendall*, 12 Q. B. 634; *Lewis v. Hance*, 11 Q. B. 921; *Gillon v. Deare*, 3 D. & L. 412; 2 C. B. 309.

⁽²⁾ *Phillips v. Ponsford*, 9 C. B. 459. See *Kemp v. Hurry*, 11 Exch. 47.

⁽³⁾ C. L. P. Act, 1852, s. 142.

⁽⁴⁾ *Stanton v. Collier*, 3 E. & B. 274.

⁽⁵⁾ *Swann v. Hutton*, 10 A. & E. 623.

⁽⁶⁾ 12 & 13 Vict. c. 106, s. 200 to 205; *Sharp v. D'Almaine*, 8 Dowl. 664; *Sadler v. Cleaver*, 7 Bing. 769.

CHAPTER VIII.

HEIRS AND DEVISEES.

1. *Heirs.*

AN heir is liable for the specialty debts of his ancestor to the extent of the real estate come to him by descent, or its proceeds; and so is the devisee.⁽¹⁾ If there be both an heir and a devisee, the action must be against both jointly.⁽²⁾ The writ of summons need not, however, describe the defendant in his representative character.⁽³⁾ He cannot be held to bail.⁽⁴⁾

Plea.—It is a good plea to an action on the ancestor's bond, that the defendant has already paid another bond creditor to the value of the land.⁽⁵⁾ If the defendant, by his plea, admit assets, without stating how much, or falsely state too little, the plaintiff, if successful, obtains judgment for the debt and costs against the defendant, as if the debt were his own;⁽⁶⁾ except where *non est factum* is falsely pleaded to the action on a specialty, for that binds the lands only.⁽⁷⁾ Where the heir has only a reversionary interest, he should specially plead this, and the judgment will then be

⁽¹⁾ 11 Geo. 4 & 1 Will. 4, c. 47, s. 6.

⁽²⁾ *Ibid.*

⁽³⁾ See *ante*, pp. 84, 85.

⁽⁴⁾ 3 Bla. Com. 292; 3 Bulstr. 316. The customary heir of a copyhold tenure cannot maintain trespass without entry; but, after entry, there is a relation back to the actual title as against a wrong doer, and he may maintain an action for trespass committed prior to his entry; *Barnett v. Earl of Guildford*, 11 Exch. 19.

⁽⁵⁾ *Buckley v. Nightingale*, 1 Str. 665.

⁽⁶⁾ 2 Wms. Saund. 7 c.; *Smith v. Angel*, 2 Lord Raym. 783.

⁽⁷⁾ *Clothworthy v. Clothworthy*, Cro. Car. 436.

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of assets *quando acciderint*.⁽¹⁾ It is a bad plea that there is an executor having assets;⁽²⁾ also that all the rents have been spent on repairs.⁽³⁾

Replication.]—If the heir plead *riens per descent* at the time of action brought, the plaintiff may reply, that the defendant had lands from his ancestor before action brought; and if issue be joined thereon, and found against the defendant, the jury shall inquire the value of such lands, and judgment and execution be awarded against him⁽⁴⁾ to the extent of the value of such lands.⁽⁵⁾ If the plaintiff take issue on the plea of *riens per descent* and obtain a verdict, he may have a general judgment against the defendant;⁽⁶⁾ or the plaintiff may confess the plea and take judgment of assets *quando acciderint*. If, however, judgment be given against the heir by confession of the action, without confessing the assets descended, or upon demurrer, or *nil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands.⁽⁷⁾

Judgment.]—The judgment may be either general against the heir, or it may be special, i. e., that the debt, damages, or costs be levied out of the lands descended,⁽⁸⁾ according to the pleadings as before mentioned. If the heir has aliened *malâ fide* the land before action brought, then the judgment will be against him, as if the debt were his own, to the extent of the value of the said lands.⁽⁹⁾

Form of Judgment against Heir for Ancestor's Debts.

— Therefore it is considered that the plaintiff do recover against the defendant his said debt and damages to £ , by the jurors aforesaid, in form aforesaid, assessed, and also £ , for his costs of suit by the court here adjudged of increase to the plaintiff, to be levied of the lands and tenements which were of the said E. F., in fee simple, at the time of his death, and which came to and are now in the hands of the defendant, by hereditary descent, from the said E. F., &c.

(1) 2 Wms. Saund. 7 c.; *Anon.* Dy. 373 b.

(2) *Davy v. Pepys*, 1 P. Wms. 203.

(3) *Shetelworth v. Neville*, 1 T. R. 454.

(4) 11 Geo. 4 & 1 Will. 4, c. 47, s. 7.

(5) *Brown v. Shuker*, 2 C. & J. 311; 1 Tyr. 400; 1 Price N. R. 1.

(6) *Matthews v. Lee*, Barnes, 444.

(7) 11 Geo. 4 & 1 Will. 4, c. 47, s. 7.

(8) See 2 Wms. Saund. 7 c, e.

(9) 11 Geo. 4 & 1 Will. 4, c. 47, s. 6.

Execution.]—If the judgment is general, execution is sued out as in ordinary cases; or the plaintiff may sue out a special writ in the nature of a writ of extent, suggesting that the heir has lands by descent, and praying execution.⁽¹⁾ If the judgment be special, a special writ of execution is also sued out.

Extent against Heir on Special Judgment against him.

VICTORIA, &c., to the sheriff &c. [*recite judgment against C. D., son and heir of E. F., deceased,*] &c. &c., to be levied of the lands and tenements which were of the said E. F., in fee simple at the time of his death, in the hands of the said C. D., whereof the said C. D. is convicted: Therefore we command you, that by the oath of honest and lawful men of your bailiwick you diligently inquire of what lands and tenements the said E. F. was seised in fee simple at the time of his death, and which descended to the said C. D., as son and heir of the said E. F., by hereditary right after the death of the said E. F., and of which the said C. D., on the _____, on which day the said A. B. sued out his writ of summons for the debt aforesaid against the said C. D. was seised in his demesne as of fee, and how much those lands and tenements, with the appurtenances, are worth by the year in all issues beyond reprises, according to the true value of the same, and when the said inquisition shall have been by you so made, that without delay you deliver the said lands and tenements, with the appurtenances, to the said A. B., to hold to him and his assigns as his freehold until the said debt and sum first aforesaid, and costs aforesaid, shall be thereof fully levied. And in what manner, &c. &c., under your seal and the seals of those by whose oath you shall make the said extent and appraisement; and have there the names of those by whose oath you shall make the said extent and appraisement, and this writ. Witness, &c.

Scire facias.]—Where the action was against the ancestor, who had died after judgment, it may be revived against the heir and terretenants, or tenants of the lands, whereof the ancestor was seised at the time of the judgment, or at any time afterwards.⁽²⁾

2. Devisees.

An action lies against a devisee in the same circumstances as against an heir.⁽³⁾

⁽¹⁾ *Bowyer v. Rivitt*, W. Jon. 87.

⁽²⁾ See *post*, "Death, &c., of party."

⁽³⁾ 11 Geo. 4 & 1 Will. 4, c. 47. See *Braithwaite v. Skinner*, 5 M. & W. 313.

CHAPTER IX.

PEERS AND MEMBERS OF PARLIAMENT.

Peers.

A **PEER** cannot be held to bail, nor outlawed, nor taken in execution by *ca. sa.*; ⁽¹⁾ and if during the action a party become a peer, he is entitled, on motion, to be discharged, if in custody. ⁽²⁾ If afterwards, however, the privilege ceases, the plaintiff is not barred from suing out a new writ of execution. ⁽³⁾ The peer should be correctly described in the writ of summons by his title of dignity. ⁽⁴⁾ But the court has refused to set aside a writ for omitting the christian names of a baron, and simply describing him as "The Right Hon. Baron S." ⁽⁵⁾

Member of Parliament.]—A member of the House of Commons is also privileged during the sitting of Parliament, and practically during the whole year, from being held to bail, outlawed, or taken in execution. Moreover, where a trader, otherwise subject to the bankrupt laws, is a member of Parliament, "if any creditor or creditors of any such trader having privilege of Parliament to an amount, hereinafter declared to be requisite (50*l.*), to support a petition for adjudication of bankruptcy, shall file an affidavit in any court of record at Westminster, that such debt is justly due to him, and that such debtor, as he verily believes, is such

⁽¹⁾ See those titles *post*.

⁽²⁾ *Phillips v. Wellesley*, 1 Dowl. 9; *Ex parte Burton*, *Id.* 14.

⁽³⁾ 2 Jac. 1, c. 13, s. 2.

⁽⁴⁾ Thus: The Right Hon. John Thomas, Baron _____, [*or* Earl of _____, *or* Viscount _____, &c.] The eldest and other sons of the higher peers are generally known by titles of courtesy, and should be styled thus: "John Russell, Esq., commonly called Lord John Russell."

⁽⁵⁾ *Wells v. Baron Suffield*, 4 C. B. 750.

trader, and shall sue out of the same court a writ of summons in the form contained in schedule E., to this act annexed, against such trader, and serve him with a copy of such summons, if such trader shall not within one month after personal service of such summons pay, secure, or compound for such debt to the satisfaction of such creditor or creditors, or enter into a bond in such sum, and with two sufficient sureties, as any of the judges of the court out of which such summons shall issue, shall approve of, to pay such sum as shall be recovered in such action, together with such costs as shall be given in the same, and within one month next after personal service of such summons cause an appearance to be entered to such action in the proper court in which the same shall have been brought, every such trader shall be deemed to have committed an act of bankruptcy from the time of the service of such summons."⁽¹⁾ Thereafter the proceedings in bankruptcy against such trader are the same as in other cases, except that he shall not be subject to be arrested or imprisoned during the time of such privilege, except in cases made felonies or misdemeanors by the act.⁽²⁾

Form of Writ of Summons to be Served on a Member of Parliament under "the Bankrupt Law Consolidation Act, 1849."

VICTORIA, &c.

To C. D., of , &c., Esq., having privilege of Parliament, greeting: We command you that within one calendar month next after personal service hereof on you, you do cause an appearance to be entered for you in our Court of , in an action [on promises or debt, or as the case may be], at the suit of A. B., and you are hereby informed that an affidavit of debt for the sum of £ hath been filed in the proper office, according to the provisions of "the Bankrupt Law Consolidation Act, 1849," and that unless you pay, secure, or compound for the debt sought to be recovered in this action, or enter into such bond as by the said act is provided, and cause an appearance to be entered for you within one calendar month next after such service hereof, you will be deemed to have committed an act of bankruptcy from the time of the service hereof.

Witness at Westminster, the day of

⁽¹⁾ Bankrupt Consolidation Act, 12 & 13 Vict. c. 106, s. 77.

⁽²⁾ *Ibid.* s. 66.

This Writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards, and is to be endorsed with the name of the Plaintiff, or his attorney, in manner following, that is to say :

This writ was issued by E. F., of attorney, for the plaintiff,
[or plaintiffs] within named :

Or,

This writ was issued in person by the plaintiff within named, who resides at , [mention the city, town, or parish, and also the name of the hamlet, street and number of the house of the plaintiff's residence. if any such there be.]

CHAPTER X.

CLERGYMEN.

Fieri facias de bonis ecclesiasticis.]—When a creditor fails to levy any goods of a beneficed clergyman, under the writ of execution addressed to the sheriff, he may by another writ have recourse to the ecclesiastical goods of the debtor; but this writ is of a limited nature, being determinable by his death, resignation, or amotion.⁽¹⁾ Thus, where a writ of *fi. fa.* has been sued out against a party, and the sheriff has returned *nulla bona*, and that he is a beneficed clerk having no lay fee, the course is to sue out a writ of *fi. fa. de bonis ecclesiasticis*, directed to the bishop of the diocese, who is the ecclesiastical sheriff.⁽²⁾ It is irregular to issue the *fi. fa. de bonis ecclesiasticis*, before a previous writ to the sheriff has been returned as above; and it is not too late, three months after the sequestration, to apply to the court to set it aside, though, in the interval, a *fi. fa.* to the sheriff has been issued and returned.⁽³⁾

Form of Fi. Fa. de Bonis Ecclesiasticis.

VICTORIA, &c., to the Right Reverend Father in God , by divine permission lord bishop of , greeting. We command you that of the ecclesiastical goods of C. D., clerk in your diocese, you cause to be made £ , which A. B., lately in our Court of , recovered against him, whereof the said C. D. is convicted, together with interest upon the said £ , at the rate of four pounds per centum per annum, from the day of , A. D. , on which day the judgment aforesaid was entered up, and have that money, together with such interest as aforesaid, before, &c., at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for

(1) *Bunter v. Cresswell*, 14 Q. B. 825.

(2) *Phelps v. St. John*, 10 Exch. 895.

(3) *Bromage v. Vaughan*, 7 Exch. 223.

that our sheriff of , returned to , at Westminster aforesaid on , that the said C. D. had not any goods or chattels, or any lay fee in his bailiwick, whereof he could cause to be made the said £ , and interest aforesaid, or any part thereof, and that the said C. D. was a beneficed clerk, to wit [rector of the rectory], and parish church of . , in the said sheriff's county, and within your diocese: and in what manner you shall have executed this our writ make appear to , at Westminster, immediately after the execution hereof; and have you there then this writ. Witness , (*name of chief of court*), at Westminster the day of , in the year of our Lord . (*The writ is indorsed as other writs, ante, p. 565 et seq.*)

This writ is taken to the registrar of the diocese, who issues a sequestration, which is a warrant directed to the churchwardens of the parish where the benefice is, to levy the debt of the tithes and other profits of the benefice; or the party may have the warrant addressed to his own bailiff on giving security to the bishop.⁽¹⁾ A copy of the sequestration must be affixed to the door of all the churches and chapels within the parish, or published in some other way, which is usual in the diocese.⁽²⁾ The writ, in case of the clergyman's insolvency, takes effect only from the date of publication,⁽³⁾ as against his assignees, though as against himself it takes effect from the appointment of the sequestrator.⁽⁴⁾ Where there is not enough in one diocese to satisfy the writ, a *testatum fi. fa.* may be sued out into another diocese.

Sequestrari facias de bonis ecclesiasticis.—The writ of execution, corresponding to a *levari facias* against other persons, is, in the case of a clergyman, a writ of *sequestrari facias*, directed to the bishop commanding him to sequester the rectory or vicarage, and pay the debt out of the rents, which writ is in the following form:

Form of Sequestrari Facias.

VICTORIA, &c., to the Right Reverend, &c. Whereas, we lately commanded our sheriff of , that he should omit not by reason of any liberty of his county, but that he should enter the same, (&c., reciting

(¹) Tidd, 1023 (9th edit.) See also *Pack v. Tarpley*, 9 A. & E. 469.

(²) *Bennett v. Apperley*, 6 B. & C. 630; 7 Will. 4 & 1 Vict. c. 45.

(³) Tidd, 1024. (9th edit.) *Waits v. Bishop*, 3 Dowl. 234; 1 C. M. R. 507.

(⁴) *Bennett v. Apperley*, 6 B. & C. 630.

former writ,) and whereupon our said sheriff of , on returned to , at Westminster, that the said C. D., was a beneficed clerk, that is to say, &c., and that he had not any goods, chattels, or any lay fee in his bailiwick whereof he could cause to be made the said £ , and interest, or any part thereof, [*or as returned by sheriff.*] Therefore we command you that you enter into the said rectory, [*or vicarage,*] and parish church of , and take and sequester the same into your possession, and that you hold the same in your possession until you shall have levied the said £ , [*or moneys,*] and interest aforesaid of the rents, tithes, rent charges in lieu of tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods in your diocese of and belonging to the said , and parish church of , and to the said C. D., as thereof, to be rendered to the said A. B., whereof the said C. D. is convicted, and what you shall do therein make appear to , at Westminster, aforesaid, immediately after the execution hereof; and have you there then this writ. Witness, &c. (*Indorse as before, adding after "expenses of execution" the words, "and sequestration."*)

This writ is obtained by motion in the Exchequer; ⁽¹⁾ but in the Common Pleas it issues without motion. ⁽²⁾ The bishop, who is in the same position as a sheriff, issues thereupon a warrant of sequestration, directing the rents, tithes, and profits to be sequestered. ⁽³⁾ It is enough that the sequestration issue before the writ is returnable, and it may be published afterwards. ⁽⁴⁾ If the writ of sequestration has omitted to order the interest to be levied, the court may refuse to allow this to be amended, if subsequent writs have reached the bishop. ⁽⁵⁾

The writs of *fi. fa. de bon. eccl.*, and of *seq. fac. de bon. eccl.* continue in force, notwithstanding the death of the bishop; ⁽⁶⁾ and the profits continue to belong to the execution creditor, until all the debt has been levied. ⁽⁷⁾ While the writ is in force, the incumbent cannot be turned out of the parsonage house; ⁽⁸⁾ but otherwise his title is ousted, ⁽⁹⁾ and he has

⁽¹⁾ *R. v. Hind*, 1 Dowl. 286; 3 Dowl. 760.

⁽²⁾ *Caudwell v. Colton*, 10 C. B. 575.

⁽³⁾ See a form *Pack v. Tarpley*, 9 A. & E. 469.

⁽⁴⁾ *Bennett v. Apperley*, 6 B. & C. 630.

⁽⁵⁾ *Watkins v. Tarpley*, 5 D. & L. 226.

⁽⁶⁾ *Phelps v. St. John*, 10 Exch. 895.

⁽⁷⁾ *Alderton v. St. Aubyn*, 6 M. & W. 150; 8 Dowl. 223; *Moore v. Ramsden*, 7 A. & E. 898; *Powell v. Hibberd*, 15 Q. B. 129.

⁽⁸⁾ *Pack v. Tarpley*, 9 A. & E. 468; 1 P. & D. 478.

⁽⁹⁾ *Powell v. Hibberd*, 15 Q. B. 129.

no right to have the writ returned, though he may obtain a return of the profits received by the sequestrator.⁽¹⁾ The bishop's authority ceases when the writ is returned, and so does the priority of the execution creditor; so that the mode of avoiding these consequences is, from time to time to rule the bishop, merely to certify to the court what he has done under the writ.⁽²⁾ The bishop is bound to obey the orders of the court, like a sheriff.⁽³⁾ The successor of the bishop, who issued the sequestration, may be called on to return the writ.⁽⁴⁾ If the attorney has been changed, a copy of the order and the change must be served on the bishop before the new attorney can rule a return.⁽⁵⁾ If the writ is returned before the execution is satisfied, the court will order him to cancel the return, and certify what he has done under the writ.⁽⁶⁾ And it is not a sufficient return merely to state the debtor and creditor account; but the bishop must verify it.⁽⁷⁾ The court may refer to the Master to report on the propriety of the allowances and deductions in the sequestrator's account returned by the bishop.⁽⁸⁾ It seems the bishop must be a party to the rule seeking to set aside a sequestration.⁽⁹⁾ A suspension of the clerk from his office operates while it endures, in respect of the perception of profits like amotion, not only against the clerk, but his creditor.⁽¹⁰⁾

Assignees of clergymen.—A warrant of attorney given to create a charge on the benefice will be set aside.⁽¹¹⁾ Where a clergyman becomes insolvent, the income of the benefice does not pass to his assignees under 1 & 2 Vict. c. 110, s. 55;⁽¹²⁾ but they may obtain a sequestration of the profits, and the order for their appointment is a sufficient warrant for

(1) *R. v. Bishop of London*, 1 D. & R. 486.

(2) *Marsh v. Faucett*, 2 H. Bl. 582; *Disney v. Eyre*, Alcock & Napier, 34.

(3) See *Phelps v. St. John*, 10 Exch. 895; *Hart v. Vollans*, 1 Dowl. 434.

(4) *Ibid.*; *Dawson v. Symonds*, 12 Q. B. 830.

(5) *Phillips v. Berkeley*, 5 Dowl. 279.

(6) *Alderton v. St. Aubyn*, 6 M. & W. 150; 8 Dowl. 223.

(7) *Elchin v. Hopkins*, 7 Dowl. 146.

(8) *Morris v. Phelps*, 4 Exch. 895; *Dawson v. Symonds*, 12 Q. B. 830.

(9) See *Bishop v. Hotch*, 1 A. & E. 183; *Smith v. Wetherell*, 5 D. & L. 278.

(10) *Bunter v. Cresswell*, 14 Q. B. 825.

(11) *Saltmarsh v. Hewett*, 1 A. & E. 812.

(12) *Bishop v. Hatch*, 1 A. & E. 171; 2 N. & M. 498.

granting such sequestration.⁽¹⁾ Such sequestration operates only from the time of publication, and does not extend to arrears.⁽²⁾ The assignees, and not the creditors, are entitled to apply for an account of the moneys received by the bishop.⁽³⁾ Where the insolvent's attorney negligently allows a sequestration to continue too long in force, the assignees may sue such attorney for the loss.⁽⁴⁾

Power of sequestrator over benefice.—The sequestrator is in the situation of a bailiff of the bishop; ⁽⁵⁾ but his power has been recently enlarged by statute. The statute 12 & 13 Vict. c. 67 extends the remedies for the recovery of the profits of sequestered benefices, as follows:—

Every sequestrator who shall be appointed by a bishop or other ordinary, or by any competent Ecclesiastical Court, to levy, collect, gather or receive the profits of any ecclesiastical benefice, by virtue or in pursuance of any writ of *fieri facias de bonis ecclesiasticis*, *levari facias de bonis ecclesiasticis*, *sequestrari facias*, or of any sequestration made or issued by authority of law, may and is hereby authorized and empowered from time to time to bring and prosecute any action at law or suit in equity, or levy any distress, or take any other proceeding in his own name as the sequestrator of such benefice, without further description, for the recovery of any tithes, tithe rent-charge, tithe composition, or substitution, obvention, pension, portion, or other payment for or in the nature or in lieu of tithe, or any other rent or annual sum, dues, or fees payable to the incumbent of such benefice, or of any messuages, lands, tenements, or hereditaments, subject to such sequestration, or of any rent, due, or payment reserved or made payable to the incumbent of such benefice, under any lease of or covenant or agreement to let any such messuages, lands, tenements, or hereditaments, tithes, tithe rent-charge, or other parcel of the benefice to which the appointment of such sequestrator relates; provided always, that nothing herein contained shall be construed to empower the sequestrator of any benefice to bring, prosecute, levy, or to take any action, suit, distress, or other proceeding by virtue of this act, except against the incumbent of such benefice, which might not lawfully have been brought, prosecuted, levied, or taken by the incumbent of such benefice, if such benefice had not been under sequestration; provided also, that no sequestrator appointed under a sequestration issued at the suit or instance of any creditor shall be bound to commence, prosecute, levy, or take any action,

⁽¹⁾ *Smith v. Wetherell*, 5 D. & L. 278; *Powell v. Hibbert*, 15 Q. B. 129.

⁽²⁾ *Waite v. Bishop*, 3 Dowl. 234.

⁽³⁾ *Ex parte Moffat*, 1 Jur. 153.

⁽⁴⁾ *Wetherell v. Julius*, 10 C. B. 267; see *Rogers v. Spence* 12 Cl. & F. 700.

⁽⁵⁾ *Harding v. Hall*, 10 M. & W. 48.

suit, distress, or other proceeding as aforesaid, under the provisions of this act, unless and until security to be approved by such sequestrator shall be given by the creditor at whose suit or instance such sequestration shall have been issued for indemnifying such sequestrator, and the bishop or other ordinary, or ecclesiastical court from all costs, charges and expenses incurred, or to be incurred, in the commencement, prosecution, or conduct of such action, suit, or distress, or other proceeding to which he or they respectively may become liable in consequence thereof, the expense of such security to be deducted or allowed out of any money to be received by the creditor by virtue of such action, suit, distress, or other proceeding.⁽¹⁾

The payment, or render to such sequestrator lawfully entitled, with or without suit by the party thereunto liable of any such tithe, tithe rent-charge, tithe composition or substitution, rent, dues, fees, or payment, shall effectually discharge the party making the same from all liability to the incumbent of such benefice in respect thereof, and that such sequestrator shall and may apply, and shall account for the moneys received, or arising under, or by virtue of any such render, payment, or recovery in like manner as other goods and profits of the benefice liable to sequestration, provided always, that nothing herein contained shall make any alteration in the law respecting the application of the money received by a sequestrator, or the security to be given by him for his duly accounting for the same.⁽²⁾

(¹) Sect. 1.

(²) Sect. 2.

CHAPTER XI.

HUNDREDORS.

THE liability of the hundred for damage done by rioters acting feloniously is regulated by 7 & 8 Geo. 4, c. 31. For damage done under 30*l.* the remedy is at petty sessions. If the damage done to the plaintiff is above 30*l.*, the plaintiff, or his servant having charge of the property injured, must, within seven days exclusive⁽¹⁾ after the injury is committed, state, on oath before some justice residing near and having jurisdiction, the names of the offenders, and enter into a recognizance to prosecute.⁽²⁾ All the persons cognizant of the circumstances should be examined on such occasions before the magistrate.⁽³⁾ But in the first instance those servants only who have the general superintendence, and not those under them having special care of particular portions only, need to make the oath.⁽⁴⁾ Where the action was brought for maliciously setting on fire, it was held that a reversioner might sue for injury to the premises, that his oath was sufficient if he had no servant on the premises, and that he was not bound to state his suspicions as to the offenders.⁽⁵⁾ When the party is before the justice, he submits to examination; but it is enough that the party should take a deposition, previously prepared, and swear to it, if the justice requires nothing further.⁽⁶⁾ The examinations,

(1) *Pellew v. Wonford Hundred*, 9 B. & C. 135.

(2) 7 & 8 Geo. 4, c. 31, s. 3; Bull. N. P. 186.

(3) *Rolfe v. Elthorne Hundred*, 1 M. & M. 185; *Duke of Somerset v. Mere Hundred*, 4 B. & C. 167; 6 D. & R. 247; *Nesham v. Armstrong*, 1 B. & Ald. 146.

(4) *Lowes v. Broxtowe Hundred*, 3 B. & Ad. 550.

(5) 9 Geo. 1, c. 22; *Pellew v. Wonford Hundred*, 9 B. & C. 134; 4 M. & R. 130.

(6) *Lowes v. Broxtowe Hundred*, 3 B. & Ad. 550.

it seems, need not be taken down in writing.⁽¹⁾ The action must be brought within three calendar months after the day on which the offence was committed.⁽²⁾ It is not decided, whether the executor of a term for years can sue for injury to the premises sustained in the lifetime of the testator.⁽³⁾

Writ of summons and service and appearance.—The writ of summons is the mode of commencing the action.⁽⁴⁾ and should be addressed “to the inhabitants of the hundred of , in the county of ,” but not to any of them individually by name, for they may cease to be inhabitants before the damages are leviable.⁽⁵⁾ “Every writ issued against the inhabitants of a hundred or other like district may be served on the high constable thereof, or any one of the high constables thereof, and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place not being part of a hundred, or other like district, on some peace officer thereof.”⁽⁶⁾ The high constable or peace officer, within seven days after service, must give notice thereof to two justices residing in and acting for the hundred, &c. ; and he then enters an appearance as in other cases on behalf of the hundred, and acts afterwards according to his instructions.⁽⁷⁾ If the two justices, to whom notice of service must have been given, so advise, the constable may allow judgment to go by default.⁽⁸⁾

Costs and damages.—The plaintiff, if successful, is entitled to his costs in the usual way.⁽⁹⁾ If the plaintiff is nonsuited, the hundred will be entitled to costs.⁽¹⁰⁾ In assessing the damages the jury are to consider, what sum will be necessary to repair the injury and replace the building in the state it was in when the outrage was committed, and not whether the plaintiff was likely to make it his residence or whether it was suitable for such residence.⁽¹¹⁾ The high

(1) *Graham v. Beantree Hundred*, Bull. N. P. 186

(2) 7 & 8 Geo. 4, c. 31, s. 3.

(3) *Adam v. Bristol Inhabitants*, 2 A. & E. 389; 4 N. & M. 144.

(4) 2 Will. 4, c. 39.

(5) *Jackson v. Pearson*, 1 B. & C. 304.

(6) C. L. P. Act, 1852, s. 16.

(7) 7 & 8 Geo. 4, c. 31, s. 4. See 2 Wms. Saund. 378 b.

(8) 7 & 8 Geo. 4, c. 31, s. 4.

(9) *Witham v. Hill*, 2 Wils. 91; 2 Lord Raym. 474.

(10) *Greetham v. Theels Hundred*, 3 Burr. 1723.

(11) *Duke of Newcastle v. Broxtowe Hundred*, 4 B. & Ad. 273.

constable is reimbursed his costs in defending the action on producing the bill of costs and proving the same before two justices of the peace, who thereupon make an order on the treasurer of the county or division. If judgment go against the plaintiff, the constable is reimbursed in the same way for any expenses incurred over and above taxed costs.⁽¹⁾

Execution.]—The 7 & 8 Geo. 4, c. 31, ss. 6, 14, enacts that, if the plaintiff succeeds in the action, no writ of execution shall be executed on any inhabitant of the hundred or the constable; but the sheriff, on receipt of the writ of execution, makes his warrant to the treasurer of the county, commanding him to pay the sum, and which the latter is authorized to do.

Form of Fieri Facias against the Inhabitants.

— we command you that of the goods and chattels of the men inhabiting within the hundred called _____, in your bailiwick, you cause to be made £ _____, which A. B., lately in our Court of _____, recovered against the said men, whereof the said men, inhabiting within the hundred aforesaid, are convicted, together with interest, &c. . . . immediately after the execution hereof, to be rendered to the said A. B., and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf, and in what manner you shall have executed this writ make appear, &c.

(¹) 7 & 8 Geo. 4, c. 31, s. 7.

CHAPTER XII.

JUSTICES, CONSTABLES, AND PARTIES ACTING UNDER STATUTES.

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| 1. Justices of the Peace.
(a) In what cases actions lie.
(b) Limitation of action.
(c) Notice of action.
(d) Venue and plea, &c.
(e) Costs. | 2. Constables.
3. Special borough and county constables.
4. Revenue officers.
5. Officers and persons generally acting under statutes. |
|--|---|

 1. *Justices of the Peace.*

THE actions against justices of the peace for anything done in the execution of their duty are regulated by 11 & 12 Vict. c. 44, which repeals all prior acts relating to such actions, and applies for the protection of all persons for anything done in the execution of their office in all cases in which such repealed statutes were formerly applicable.⁽¹⁾

(a) *Acts done within his jurisdiction.*]—"Every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as such justice, with respect to any matter within his jurisdiction as such justice, shall be an action on the case as for a tort, and in the declaration it shall be expressly alleged that such act was done maliciously, and without reasonable and probable cause, and if at the trial of any such action, upon the general issue being pleaded, the plaintiff shall fail to prove such allegation, he shall be nonsuit, or a verdict shall be given for the defendant."⁽²⁾

⁽¹⁾ 11 & 12 Vict. c. 44, s. 18.

⁽²⁾ *Ibid.* s. 1.

Acts done without jurisdiction.]—"For any act done by a justice of the peace in a matter of which by law he has not jurisdiction, or in which he shall have exceeded his jurisdiction, any person injured thereby, or by any act done under any conviction or order made, or warrant⁽¹⁾ issued by such justice in any such matter, may maintain an action against such justice in the same form, and in the same case as he might have done before the passing of this act, without making any allegation in his declaration that the act complained of was done maliciously, and without reasonable and probable cause: provided, nevertheless, that no such action shall be brought for anything done under such conviction or order, until after such conviction shall have been quashed, either upon appeal or upon application to Her Majesty's Court of Queen's Bench; nor shall any such action be brought for anything done under any such warrant, which shall have been issued by such justice to procure the appearance of such party, and which shall have been followed by a conviction or order in the same matter, until after such conviction or order shall have been so quashed as aforesaid; or if such last-mentioned warrant shall not have been followed by any such conviction or order, or if it be a warrant upon an information for an alleged indictable offence, nevertheless, if a summons were issued previously to such warrant, and such summons were served upon such person either personally or by leaving the same for him with some person at his last or most usual place of abode, and he did not appear according to the exigency of such summons, in such case no such action shall be maintained against such justice for anything done under such warrant."⁽²⁾

Conviction by one, and warrant by another justice.]—"Where a conviction or order shall be made by one or more justice or justices of the peace, and a warrant of distress or of commitment shall be granted thereon by some other justice of the peace *bonâ fide* and without collusion, no action shall be brought against the justice who so granted such warrant, by reason of any defect in such conviction or order, or for any want of jurisdiction in the justice or justices who made

⁽¹⁾ See *Bessell v. Wilson*, 1 E. & B. 489.

⁽²⁾ 11 & 12 Vict. c. 44, s. 2. The notice of action required (see *post*, p. 705) may be given before the quashing of the order, the cause of action being complete before the quashing, which is only a condition to the prosecution of the action, like the delivery of an attorney's signed bill of costs. *Haylock v. Sparke*, 1 E. & B. 471.

the same, but the action, if any, shall be brought against the justice or justices who made such conviction or order."⁽¹⁾

Warrant for poor rate.]—"Where any poor rate shall be made, allowed, and published, and a warrant of distress shall issue against any person named and rated therein, no action shall be brought against the justice or justices who shall have granted such warrant by reason of any irregularity or defect in the said rate, or by reason of such person not being liable to be rated therein, and that in all cases where a discretionary power shall be given to a justice of the peace by any act or acts of Parliament, no action shall be brought against such justice for or by reason of the manner in which he shall have exercised his discretion in the execution of any such power."⁽²⁾

Mode of trying legality of act.]—"In all cases where a justice or justices of the peace shall refuse to do any act relating to the duties of his or their office as such justice or justices, it shall be lawful for the party, requiring such act to be done, to apply to the Court of Queen's Bench upon an affidavit of the facts for a rule, calling upon such justice or justices, and also the party to be affected by such act, to show cause why such act should not be done; and if, after due service of such rule, good cause shall not be shown against it, the said court may make the same absolute, with or without, or upon payment of costs, as to them shall seem meet; and the said justice or justices, upon being served with such rule absolute, shall obey the same, and shall do the act required; and no action or proceeding whatsoever shall be commenced or prosecuted against such justice or justices for having obeyed such rule and done such act so thereby required as aforesaid."⁽³⁾

After conviction confirmed, no action.]—"In all cases where a warrant of distress, or warrant of commitment shall be granted by a justice of the peace upon any conviction or order, which either before or after the granting of such warrant shall have been or shall be confirmed upon appeal, no action shall be brought against such justice, who so granted such warrant, for anything which may have been done under

(¹) 11 & 12 Vict. c. 44, s. 3.

(²) *Ibid.* s. 4.

(³) *Ibid.* s. 5.

the same, by reason of any defect in such conviction or order.”⁽¹⁾

Setting aside action wrongly brought.]—“In all cases, where by this act it is enacted, that no action shall be brought under particular circumstances, if any such action shall be brought, it shall be lawful for a judge of the court, in which the same shall be brought, upon application of the defendant, and upon an affidavit of facts, to set aside the proceedings in such action with or without costs, as to him shall seem meet.”⁽²⁾

(b) Limitation of action.]—“No action shall be brought against any justice of the peace for anything done by him in the execution of his office, unless the same be commenced within *six calendar months* next after the act complained of shall have been committed,”⁽³⁾ i. e. exclusive of the day of committing the act.⁽⁴⁾ The time, in the case of a distress for church rates, was calculated from the day on which the distress was sold.⁽⁵⁾ It is enough if any part of an imprisonment was within the six months.⁽⁶⁾

(c) Notice of action.]—“No such action shall be commenced against any such justice of the peace until *one calendar month*, at least, after a notice in writing of such intended action shall have been delivered to him, or left for him at his usual place of abode by the party intending to commence such action, or by his attorney or agent, in which said notice the cause of action, and the court in which the same is intended to be brought, shall be clearly and explicitly stated, and upon the back thereof shall be indorsed the name and place of abode, or of business, of the said attorney or agent, if such notice have been served by such attorney or agent.”⁽⁷⁾

In what cases.]—The magistrate is entitled to this notice, when he *bonâ fide* and reasonably believes, that he was acting in the character of a justice, and in the execution of

⁽¹⁾ 11 & 12 Vict. c. 44, s. 6.

⁽²⁾ *Ibid.* s. 7.

⁽³⁾ *Ibid.* s. 8.

⁽⁴⁾ *Hardy v. Ryle*, 9 B. & C. 603; *Young v. Higgon*, 6 M. & W. 49.

⁽⁵⁾ *Collins v. Rose*, 5 M. & W. 194; 7 Dowl. 796

⁽⁶⁾ *Massey v. Johnson*, 12 East, 67.

⁽⁷⁾ 11 & 12 Vict. c. 44, s. 9.

his duty; ⁽¹⁾ and it is necessary, in cases where he has acted within his jurisdiction, even though he may have acted maliciously, and without probable cause. ⁽²⁾ If, however, the act has no reference to his character as a magistrate, no notice is necessary; ⁽³⁾ as, where the action is for his not being duly qualified, ⁽⁴⁾ or where he *bonâ fide* believed he was a magistrate, but was in fact not so. ⁽⁵⁾ The notice is not the less necessary, because the justice may not have known of his privilege of receiving notice. ⁽⁶⁾ It is for the judge to decide whether the notice is necessary; and, it seems, the question of *bona fides* is not to be left to the jury; at all events, that question does not arise, where the action is for acting maliciously, and without probable cause. ⁽⁷⁾ A tender of amends by the justice does not dispense with proof of the notice. ⁽⁸⁾

By whom.]—The notice must be given by the plaintiff himself, or by his attorney or agent. ⁽⁹⁾ It may be given by the *prochein amy* of an infant, though he is not the *prochein amy* on the record. ⁽¹⁰⁾ Where a notice was given on behalf of two, one having died and the other bringing the action, it was held insufficient. ⁽¹¹⁾ Where it was signed by the party, but indorsed by his attorney, it was held sufficient. ⁽¹²⁾

Form of notice.]—The notice should be addressed to the defendant in a more formal mode than an ordinary letter, ⁽¹³⁾ though it is not construed with the strictness of a pleading. ⁽¹⁴⁾ The cause of action, and the court in which the action is

⁽¹⁾ *Read v. Coker*, 13 C. B. 850; *Cann v. Clipperton*, 10 A. & E. 582; *Booth v. Clive*, 10 C. B. 827; *Horn v. Thornborough*, 3 Exch. 846.

⁽²⁾ *Kirby v. Simpson*, 10 Exch. 358.

⁽³⁾ *James v. Saunders*, 10 Bing. 429; 4 M. & Sc. 316.

⁽⁴⁾ *Wright v. Horton*, Holt, 458.

⁽⁵⁾ *Copland v. Powell*, 1 Bing. 369; *Hughes v. Buckland*, 15 M. & W. 356; *Lister v. Barrow*, 9 A. & E. 654.

⁽⁶⁾ *Read v. Coker*, 13 C. B. 850.

⁽⁷⁾ *Kirby v. Simpson*, 10 Exch. 358; see *Cox v. Reid*, 13 Q. B. 558.

⁽⁸⁾ *Martins v. Upcher*, 3 Q. B. 662.

⁽⁹⁾ 11 & 12 Vict. c. 44, s. 9.

⁽¹⁰⁾ *De Gondouin v. Lewis*, 10 A. & E. 117.

⁽¹¹⁾ *Pilkington v. Riley*, 3 Exch. 739.

⁽¹²⁾ *Morgan v. Leach*, 10 M. & W. 558.

⁽¹³⁾ *Lewis v. Smith*, Holt, N. P. C. 27.

⁽¹⁴⁾ *Jones v. Bird*, 5 B. & Ald. 837.

to be brought, must be clearly and explicitly stated.⁽¹⁾ Other matters, such as the addition and residence of the defendant, the form of action, the names of all the parties intended to be included, are not essential; and a mistake as to the number of the parties is not fatal.⁽²⁾ If the act was within the justice's jurisdiction, being within sect. 1 of the statute, the notice must allege that the act was done "maliciously," and it is not enough to say "without reasonable or probable cause."⁽³⁾ The time and place of the act should be stated with reasonable certainty.⁽⁴⁾

Form of Notice of Action by the Attorney.

To C. D., of _____, Esq., acting as one of Her Majesty's Justices of the Peace, for _____.

I do hereby, as the attorney [or agent] of and for A. B., of _____, according to the form of the statute in such case made and provided, give you notice that the said A. B. will at or soon after the expiration of one calendar month from the time of your being served with this notice, cause a writ of summons to be sued out of Her Majesty's Court of _____, against you at the suit of the said A. B., and proceed thereupon according to law. For that you, the said C. D., on the _____ day of _____, at _____, [here specify with precision the cause of action, giving the time and place, thus, "you assaulted the said A. B., and caused him to be apprehended by a policeman, and to be detained and kept in prison at _____, for a space of _____ hours,"] to the damage of the said A. B. of £ _____. Dated the _____.

P. A., of _____, attorney for the said A. B.

[There must be indorsed on the notice the name and address of the attorney, as, "P. A., of No. _____, street, in the parish of _____, and county of _____, attorney for the within-named A. B. of _____, in the parish of _____, in the county of _____."]

Indorsement on notice.—On the back of the notice must be indorsed the name and place of abode of the party intending to sue, and also that of the attorney or agent, if it is he who serves it.⁽⁵⁾ It is sufficient to give the initial of the attorney's christian name,⁽⁶⁾ or those of the firm.⁽⁷⁾ "Given

⁽¹⁾ 11 & 12 Vict. c. 44, s. 9, ante, p 705.

⁽²⁾ *Breese v. Jerdein*, 12 L. J. 124, Q. B.; *Hollingsworth v. Palmer*, 4 Exch. 267; *Pilkington v. Riley*, 3 Exch. 739.

⁽³⁾ *Taylor v. Nesfield*, 3 E. & B. 724.

⁽⁴⁾ *Leary v. Patrick*, 15 Q. B. 266; *Jacklin v. Fytche*, 14 M. & W. 381; *Prickett v. Greatrex*, 8 Q. B. 1020; *Breese v. Jerdein*, 4 Q. B. 585; *Martins v. Upcher*, 3 Q. B. 662.

⁽⁵⁾ 11 & 12 Vict. c. 44, s. 9.

⁽⁶⁾ *Mayhew v. Locke*, 7 Taunt. 63.

⁽⁷⁾ *James v. Swift*, 4 B. & C. 681; 1 D. & R. 625.

under my hand at Durham " is an insufficient address, for it denotes only the place of signature.⁽¹⁾ It is sufficient that a firm of attorneys sign it, though the firm is dissolved before the action is brought.⁽²⁾

When and how served.—The notice must be served one calendar month before the action is brought ;⁽³⁾ and the days of serving the notice and of bringing the action must be excluded from the computation.⁽⁴⁾ The notice either may be personally served, or may be left for the defendant, at his usual place of abode.⁽⁵⁾ The notice, in cases where the justice had no jurisdiction, may be given before the quashing of the order, the act itself being the cause of action, and such cause of action being complete before the quashing, though the action itself cannot be brought until after the quashing.⁽⁶⁾

(d) Venue and plea.—“In every such action the venue shall be laid in the county where the act complained of was committed, or in actions in the County Court, the action must be brought in the court within the district of which the act complained of was committed, and the defendant shall be allowed to plead the general issue therein, and to give any special matter of defence, excuse, or justification in evidence under such plea, at the trial of such action ; provided always, that no action shall be brought in any such County Court against a justice of the peace for anything done by him in the execution of his office, if such justice shall object thereto, and if within six days after being served with a summons in any such action, such justice, or his attorney or agent, shall give a written notice to the plaintiff in such action, that he objects to being sued in such County Court for such cause of action, all proceedings afterwards had in such County Court in any such action shall be null and void.”⁽⁷⁾ The plea must have the words “by statute” inserted in the margin.⁽⁸⁾

⁽¹⁾ *Taylor v. Fenwick*, 7 T. R. 635.

⁽²⁾ *Hollingworth v. Palmer*, 4 Exch. 267.

⁽³⁾ 11 & 12 Vict. c. 44, s. 9.

⁽⁴⁾ *Young v. Higgon*, 6 M. & W. 49.

⁽⁵⁾ 11 & 12 Vict. c. 44, s. 9.

⁽⁶⁾ *Haylock v. Sparke*, 1 E. & B. 471.

⁽⁷⁾ 11 & 12 Vict. c. 44, s. 10.

⁽⁸⁾ See Rule Pl. 21 T. T. 1853, *ante*, 182.

Tender and payment into court..]—"In every such case, after notice of action shall be so given as aforesaid, and before such action shall be commenced, such justice, to whom such notice shall be given, may tender to the party complaining, or to his attorney or agent, such sum of money as he may think fit as amends for the injury complained of in such notice; and after such action shall have been commenced, and at any time before issued joined therein, such defendant, if he have not made such tender, or in addition to such tender, shall be at liberty to pay into court such sum of money as he may think fit, and which said tender and payment of money into court, or either of them, may afterwards be given in evidence by the defendant at the trial under the general issue aforesaid; and if the jury at the trial shall be of opinion, that the plaintiff is not entitled to damages beyond the sum so tendered or paid into court, then they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be nonsuit, and the sum of money, if any, so paid into court, or so much thereof as shall be sufficient to pay or satisfy the defendant's costs in that behalf, shall thereupon be paid out of court to him, and the residue, if any, shall be paid to the plaintiff; or if, where money is so paid into court in any such action, the plaintiff shall elect to accept the same in satisfaction of his damages in the said action, he may obtain from any judge of the court, in which such action shall be brought, an order that such money shall be paid out of court to him, and that the defendant shall pay him his costs to be taxed, and thereupon the said action shall be determined, and such order shall be a bar to any other action for the same cause."⁽¹⁾

When plaintiff nonsuited, or verdict against him..]—"If at the trial of any such action the plaintiff shall not prove that such action was brought within the time hereinbefore limited in that behalf, or that such notice as aforesaid was given one calendar month before such action was commenced, or if he shall not prove the cause of action stated in such notice, or if he shall not prove that such cause of action arose in the county or place laid as *venue* in the margin of the declaration, or, when such plaintiff shall sue in the County Court, within the district for which such court is holden, then and in every such case such plaintiff shall be nonsuit, or the jury shall give a verdict for the defendant."⁽²⁾

(1) 11 & 12 Vict. c. 44, s. 11.

(2) *Ibid.* s. 12.

What damages..]—"In all cases, where the plaintiff in any such action shall be entitled to recover, and he shall prove the levying or payment of any penalty or sum of money under any conviction or order as parcel of the damages he seeks to recover, or if he prove that he was imprisoned under such conviction or order, and shall seek to recover damages for any such imprisonment, he shall not be entitled to recover the amount of such penalty or sum so levied or paid, or any sum beyond the sum of twopence, as damages for such imprisonment, or any costs of suit whatsoever, if it shall be proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum he was so ordered to pay, and with respect to such imprisonment, that he had undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for nonpayment of the sum he was so ordered to pay."(¹)

(e) *Costs.*.]—"If the plaintiff in any such action shall recover a verdict, or the defendant shall allow judgment to pass against him by default, such plaintiff shall be entitled to costs in such manner as if this act had not been passed, or if in such case it be stated in the declaration, or in the summons and particulars in the County Court, (if he sue in that court,) that the act complained of was done maliciously and without reasonable and probable cause, the plaintiff, if he recover a verdict for any damages, or if the defendant allow judgment to pass against him by default, shall be entitled to his full costs of suit to be taxed as between attorney and client; and in every action against a justice of the peace for anything done by him in the execution of his office, the defendant, if he obtain judgment upon verdict or otherwise, shall in all cases be entitled to his full costs in that behalf, to be taxed as between attorney and client."(²)

Metropolitan police magistrates..]—The magistrates of the metropolitan police courts are protected against actions done in pursuance of the Metropolitan Police Acts.(³) The notice of action must be according to the terms pointed out

(¹) 11 & 12 Vict. c. 44, s. 13.

(²) *Ibid.* s. 14. See Gray on Costs, p. 245, as to the apparent conflict between these two sections.

(³) 10 Geo 4, c. 44; 2 & 3 Vict. c. 71; and 3 & 4 Vict. c. 84; which are not local and personal acts within 5 & 6 Vict. c. 97; *Burnell v. Cox*, 9 Q. B. 617.

in 10 Geo. 4, c. 44, s. 41, and 2 & 3 Vict. c. 71, s. 53. The venue must be laid in the county of Middlesex, and though the act done was within the ordinary province of a county justice of the peace, the action against him must be commenced within three and not six calendar months.⁽¹⁾

2. Constables.

Actions against constables, and persons acting under their orders, must be brought within six calendar months after the cause of action accrued; and any constable acting *bonâ fide*, believing he is doing his duty, is, though mistaken, within the protection of the act 24 Geo. 2, c. 44, s. 8.⁽²⁾ But if, having a warrant to take the goods of A., he *bonâ fide* seize those of B., he is not protected, as he is not then acting in obedience to the warrant.⁽³⁾

Demand of perusal and copy of warrant.—No notice of action is necessary. But when the constable, or other person has acted under a warrant under the hand and seal of the justice of the peace, the plaintiff must make a demand in writing for a perusal and copy of this warrant. This demand in writing is signed by the party or his attorney,⁽⁴⁾ and must be left by him, or the attorney's clerk, at the usual abode of the proposed defendant;⁽⁵⁾ and though no time need be specified, the demand is not bad for naming a less time than six days.⁽⁶⁾ If the perusal or copy be not granted within six days after service, or before action brought,⁽⁷⁾ then, unless the plaintiff has waived his demand,⁽⁸⁾ he may bring his action against the constable alone, without joining the justice. If, however, the copy of the warrant be duly granted, then the justice must be made a co-defendant, and on proof of the warrant, the verdict must be for the constable, and if a verdict be found against the justice, the plaintiff will recover the costs payable by him to the constable.⁽⁹⁾ If

(1) *Hazeldine v. Grove*, 3 Q. B. 907; 3 G. & D. 210; *Miller v. Leather*, 22 L. J. 76, Q. B., M. C.

(2) *Gosden v. Elphick*, 4 Exch. 445.

(3) *Munday v. Stubbs*, 1 L. M. & P. 675.

(4) *Jory v. Orchard*, 2 B. & P. 42.

(5) *Clarke v. Davey*, 4 Moore, 465; *Clarke v. Woods*, 2 Exch. 395.

(6) *Collins v. Rose*, 5 M. & W. 194; 7 Dowl. 796.

(7) *Jones v. Vaughan*, 5 East, 445.

(8) *Atkins v. Kilby*, 11 A. & E. 777; 4 P. & D. 145.

(9) 24 Geo. 2, c. 44, s. 6.

the justice has not been made a co-defendant when he ought to be so, the defendant will be entitled to a verdict, though the warrant may have been made without jurisdiction,⁽¹⁾ and provided the constable complied with the demand.⁽²⁾ The mere fact of the justice being joined as a defendant does not entitle the constable to a verdict, unless he has complied with the demand.⁽³⁾ The constable is not excused from complying with the demand, though the plaintiff had obtained a copy previously.⁽⁴⁾

Form of Demand of Perusal and Copy of Warrant.

To C. D.

I do hereby, as the attorney [or agent] of and for A. B., of _____, according to the form of the statute in such case made and provided, demand of you the perusal and copy of the warrant, by virtue or under colour of which you did on or about the _____ day of _____ last, arrest and take into custody [or as the case may be] the said A. B.

Dated, &c.

P. A., of _____, attorney for the said A. B.

Where the constable acted in a manner not authorized by the warrant, no demand of the perusal or copy thereof is necessary.⁽⁵⁾

Pleadings.—The venue must be laid in the county where the acts complained of were committed.⁽⁶⁾ The constable, as defendant, may plead the general issue, adding in the margin "by statute,"⁽⁷⁾ and then give the special matter in evidence.⁽⁸⁾

Costs.—If the defendant succeed, he is entitled to his full costs,⁽⁹⁾ provided the judge who tried the cause shall certify that such action was brought against him as a

⁽¹⁾ See *Atkins v. Kilby*, 11 A. & E. 777.

⁽²⁾ *Lyons v. Golding*, 3 C. & P. 586.

⁽³⁾ *Clarke v. Woods*, 2 Exch. 395.

⁽⁴⁾ *Ibid.*

⁽⁵⁾ *Peppercorn v. Hoffman*, 9 M. & W. 618; *Jones v. Chapman*, 14 M. & W. 124; *Hoye v. Bush*, 1 M. & Gr. 775; 2 Sc. N. R. 86.

⁽⁶⁾ 7 & 8 Geo. 4, c. 29, s. 75; c. 30, s. 41; 21 Jac. 1, c. 12, s. 5.

⁽⁷⁾ Rule Pl. 21 T. T. 1853, *ante*, p. 182.

⁽⁸⁾ 21 Jac. 1, c. 12; *Rowcliffe v. Murray*, Car. & M. 513.

⁽⁹⁾ 5 & 6 Vict. c. 97, s. 2; 21 Jac. 1. c. 12.

public officer, for something done by him in execution of his duty.⁽¹⁾ No suggestion, it seems, for the costs is necessary.⁽²⁾

3. *Special constables.*]—Where special constables acting under 1 & 2 Will. 4, c. 41 are sued, the venue must be laid in the county where the act was done. A calendar month's notice of action must be given.⁽³⁾ The action must be commenced within six calendar months after the act is done. The defendant may plead the general issue and give the special matter in evidence, or may tender amends or pay money into court; and "if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant unless the judge, before whom the trial shall be, shall certify his approbation of the action and of the verdict obtained thereon."⁽⁴⁾

County police constable.]—The county police have the same privileges as special constables.⁽⁵⁾ If a warrant is addressed to a parish constable, and a county constable executes it, he does not act in obedience to the warrant.⁽⁶⁾

Metropolitan police constables.]—The metropolitan police have the same privileges.⁽⁷⁾ The Metropolitan Police Acts

⁽¹⁾ *Penny v. Wade*, 7 Sc. 484; 7 Dowl. 440; *Wells v. Ody*, 3 Dowl. 799; 2 C. M. R. 128; *Johnson v. Stanton*, 2 B. & C. 621; 4 D. & R. 156.

⁽²⁾ *Forman v. Dawes*, 11 M. & W. 730; 1 D. & L. 299.

⁽³⁾ See 5 & 6 Vict. c. 97, s. 4; 7 & 8 Geo. 4, c. 29, s. 75; *Ibid.* c. 30, s. 41. If a party make a wrongful distress for two causes, one only entitling him to notice of action, he may be sued in the other cause without notice. *Lamont v. Southall*, 5 M. & W. 416.

⁽⁴⁾ 1 & 2 Will. 4, c. 41, s. 19.

⁽⁵⁾ 2 & 3 Vict. c. 93.

⁽⁶⁾ *Freegard v. Barnes*, 7 Exch. 827. See a notice of action which was sufficiently specific as to time and place, *Jones v. Nicholls*, 13 M. & W. 261.

⁽⁷⁾ 10 Geo. 4, c. 44, ss. 4, 44; 2 & 3 Vict. c. 71, s. 53; 3 & 4 Vict. c. 84.

are not local and personal acts within the 5 & 6 Vict. c. 97.⁽¹⁾

Parish constables.—These have also similar privileges.⁽²⁾

Borough constables.—Borough constables, under 5 & 6 Will. 4, c. 76, ss. 76, 133, are on the same footing regarding acts done within the borough, and also within the county where such borough is situated, as other constables. If the plaintiff discontinues, the defendant is entitled to full costs, under 5 & 6 Vict. c. 97, s. 2, and not merely to costs as between attorney and client.⁽³⁾ Where he is sued in replevin for an act done out of the borough, but within the county, he may, under the plea of *non cepit*, give the special matter in evidence.⁽⁴⁾

4. *Revenue officers.*—When an action is brought against a revenue officer, acting under 8 & 9 Vict. c. 87, for a wrongful seizure, the judge may certify there was a probable cause for seizure, in which case the plaintiff will be entitled, besides the value of the goods, to not more than twopence damages, and to no costs.⁽⁵⁾ The value of the goods means the value at the time of the seizure.⁽⁶⁾ A calendar month's notice must be given of any action for anything done under the act, and it must state the name and place of abode of the plaintiff, and of his attorney or agent,⁽⁷⁾ and at the trial the plaintiff can prove no other cause of action than what is stated in the notice.⁽⁸⁾ An officer acting *bonâ fide* in execution of his duty is entitled to the notice.⁽⁹⁾ The defendant may tender amends⁽¹⁰⁾ or pay money into court.⁽¹¹⁾ The action must be brought within six months after the cause of action arose, and the venue laid in the place where it arose; and the defendant may plead the general issue and give the

(1) *Barnett v. Cox*, 9 Q. B. 617.

(2) 5 & 6 Vict. c. 109, s. 15.

(3) *Maberley v. Titterton*, 7 M. & W. 540.

(4) *Meller v. Leather*, 22 L. J. 76, M. C.

(5) 8 & 9 Vict. c. 87, s. 116.

(6) *Laugher v. Bressitt*, 5 B. & Ald. 762.

(7) 8 & 9 Vict. c. 87, s. 117. A *prochein amy* other than the one on the record may give the notice of action. *De Goudouin v. Lewis*, 10 A. & E. 117.

(8) 8 & 9 Vict. c. 87, s. 118.

(9) *Daniel v. Wilson*, 5 T. R. 1.

(10) 8 & 9 Vict. c. 87, s. 119.

(11) *Ibid.* s. 120.

special matter in evidence thereunder, and if he succeed will be entitled to treble costs.⁽¹⁾

5. Officers or other parties acting under statutes generally.]

—There are many other public officers protected, in a similar manner to those already stated, from actions in respect of acts done under the authority of statutes.⁽²⁾ The statute 5 & 6 Vict. c. 97, was passed with a view to induce uniformity in giving one calendar month's notice of action,⁽³⁾ and in limiting the period within which the action might be brought to two years, or, in case of continuing damage, to one year, from the cessation of the damage;⁽⁴⁾ but subsequent statutes have broken through the rule.⁽⁵⁾ The same statute substituted other costs for the double and treble costs generally awarded to the successful defendant.⁽⁶⁾ A person who is not within the meaning of such acts is not protected, however much he may have acted in good faith, or believed himself to be protected.⁽⁷⁾ But it is enough that the defendant is an officer *de facto* under the act,⁽⁸⁾ as a surveyor of highways informally appointed,⁽⁹⁾ or the servant of a person who *bonâ fide* but erroneously believed himself to be the owner of a fishery;⁽¹⁰⁾ but a bailiff, who acted under another who was not properly appointed, was held not entitled.⁽¹¹⁾ The necessity of giving notice is not confined to actions for torts; it exists where a turnpike collector is sued for money had and received,⁽¹²⁾ but not where there was a specific contract to execute works.⁽¹³⁾ So, notice was not necessary where guardians of a parish were sued under a local act for work and labour.⁽¹⁴⁾ But where a contractor, under the Board of Health Act, 11 & 12 Vict. c. 63, negligently

⁽¹⁾ 8 & 9 Vict. c. 87, s. 121.

⁽²⁾ See some mentioned *ante*, p. 62.

⁽³⁾ 5 & 6 Vict. c. 97, s. 4.

⁽⁴⁾ *Ibid.* s. 5.

⁽⁵⁾ See *ante*, pp. 62 and 64.

⁽⁶⁾ See *ante*, p. 464.

⁽⁷⁾ *Copland v. Powell*, 1 Bing. 369; 8 Moore, 400; *Jones v. Williams*, 3 B. & C. 762; *Hughes v. Buckland*, 15 M. & W. 346; *Lidster v. Barron*, 9 A. & E. 654.

⁽⁸⁾ *Ibid.*; *Braham v. Watkins*, 16 M. & W. 77.

⁽⁹⁾ *Huggins v. Wayday*, 15 M. & W. 357.

⁽¹⁰⁾ *Hughes v. Buckland*, 15 M. & W. 346.

⁽¹¹⁾ *Tarrant v. Baker*, 14 C. B. 199.

⁽¹²⁾ *Waterhouse v. Keen*, 4 B. & C. 211.

⁽¹³⁾ *Davies v. Mayor of Swansea*, 8 Exch. 808.

⁽¹⁴⁾ *Fletcher v. Greenwood*, 4 Dowl. 166.

dug a well, he was held entitled to notice of action.⁽¹⁾ And, as a general rule, to entitle a party to notice of action for a thing in pursuance of an Act, it is not necessary that he should, at the time of doing the act, be cognisant of the existence of the statute giving him such protection, or that he should be acting strictly in the execution of it.⁽²⁾ Where one party was clerk to two public bodies, to one of which bodies notice was necessary, and it was addressed to the wrong body, the notice was held insufficient.⁽³⁾ Where, after serving a notice of action, the action was discontinued and a new action commenced within the time limited, another defendant being added, it was held the original notice was sufficient.⁽⁴⁾ Want of notice of action must in general be specially pleaded.⁽⁵⁾ The costs of notice of action are allowed, unless the notice extends to a great length.⁽⁶⁾

When the general issue is proper to be pleaded, the words "by statute" should be inserted in the margin.⁽⁷⁾

(1) *Newton v. Ellis*, 5 E. & B. 115.

(2) *Read v. Coker*, 13 C. B. 850.

(3) *Hider v. Dorrell*, 1 Taunt. 383.

(4) *Jones v. Simpson*, 1 C. & J. 174.

(5) 5 & 6 Vict. c. 97; Rule Pl. T. T. 1853; *Edwards v. Great Western Railway Company*, 11 C. B. 588; *Ducey v. Warne*, 14 M. & W. 199; *Law v. Dodd*, 17 L. J. 65, M. C.; 1 Exch. 845.

(6) *Edwards v. Great Western Railway Company*, 12 C. B. 419; *Kent v. Great Western Railway Company*, 3 C. B. 714.

(7) Rule Pl. 21 T. T. 1853.

CHAPTER XI.

PRISONERS.

1. Actions against prisoners.

- (a) Holding to bail.
- (b) Declaration, &c.
- (c) Charging in execution.
- (d) Discharge by *supersedeas*.
- (e) Discharge under Small Debtors' Act.

(f) Discharge by plaintiff's death, &c.

2. Actions against Keeper of Queen's Prison.

- (a) Removal of prisoners into Queen's Prison.

PRISONERS are subject to the rules and regulations authorized by 5 & 6 Vict. c. 22, and 11 & 12 Vict. c. 7. The removal of a person from one part of a prison to another, in which he is not legally confined, is a trespass.⁽¹⁾ Prisoners are not entitled to obtain a *habeas corpus*, in order to come out of prison whenever they think proper to conduct proceedings in court.⁽²⁾ And the wife of a prisoner is not entitled to conduct his case at *Nisi Prius* as his advocate.⁽³⁾

A prisoner sues as in ordinary cases, and if he is nonsuited, he may be charged in execution for the costs.⁽⁴⁾

1. *Actions against prisoners.*]—An action against a prisoner commences with a writ of summons.

(a) *Holding prisoner to bail.*]—Where the defendant is in custody of the sheriff on a *civil* account, a writ of *capias* may

(¹) *Cobbett v. Grey*, 4 Exch. 729; see also *Stead v. Anderson*, 1 L. M. & P. 109; 9 C. B. 262; *Howard v. Hudson*, 2 E. & B. 2.

(²) *Ford v. Graham*, 10 C. B. 369; 1 L. M. & P. 604; *Clark v. Smith*, 3 C. B. 982.

(³) *Cobbett v. Hudson*, 15 Q. B. 988.

(⁴) *Furnival v. Stringer*, 3 Bing. N. C. 96; 5 Dowl. 195; see where he is liable to give security for costs, *post* "Security for Costs."

be sued out on the usual affidavit, and a warrant taken with it to the sheriff's office. Where he is in the Queen's prison on a civil account, it seems, the only mode is for the bailiff who executes the *capias* to ascertain from the keeper of the Queen's prison when the defendant is likely to be discharged, and to take him thereupon under the *capias*.⁽¹⁾ Where the defendant has applied for his discharge to the Insolvent Court, and has been adjudged to be entitled to his discharge at a future time, the creditor may issue a *capias*, and detain him up to such time, but no longer.⁽²⁾

If the defendant is in custody of the sheriff on a *criminal* account, he is detained in the same way;⁽³⁾ but if he is in the custody of the keeper of the Queen's prison, leave must be obtained of the court or a judge to serve the *capias*.⁽⁴⁾

"Every rule or order of a judge directing the discharge of a defendant out of custody, upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith, where defendant is in a county gaol."⁽⁵⁾

The Act 2 Will. 4, c. 39, prescribes the two following forms:—

(1.) *Form of Writ of Capias.*

VICTORIA, &c.: To the Sheriff of _____, [or to the Constable of Dover Castle, or to the Mayor and Bailiffs of Berwick-upon-Tweed, or as the case may be,] greeting. We command you [or as before or often we have commanded you] that you omit not by reason of any liberty in your bailiwick, but that you enter the same and take C. D., of _____, if he shall be found in your bailiwick, and him safely keep, until he shall have given you bail, or made deposit with you according to law, in an action on promises, [or of debt, &c.] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof, you do deliver a copy hereof to the said C. D. And we do hereby require the said C. D. to take notice that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of _____, to

(1) See *Edwards v. Robertson*, 5 M. & W. 520; 7 Dowl. 859.

(2) 1 & 2 Vict. c. 110, s. 85. A remanded insolvent is not within this section, *Turnor v. Darnell*, 5 M. & W. 28; 1 Dowl. 846; and if a discharged insolvent is arrested by a *capias* under this section, no judge's order is necessary under sect. 3: *Bilton v. Clapperton*, 9 M. & W. 473.

(3) Where the governor of the prison refused to allow process to be served on the prisoner, see *Danson v. Le Capelain*, 7 Exch. 667.

(4) See *Granger v. Moore*, 5 Dowl. 456.

(5) Rule Pr. 123, H. T. 1853.

the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written, or indorsed hereon. And we do further command you, the said sheriff, that immediately after the execution hereof, you do return this writ to our said court, together with the manner in which you shall have executed the same, and the day of the execution hereof; or that, if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner, if you shall be thereto required by order of the said court, or any judge thereof. Witness , at Westminster, the day of .

Memoranda to be subscribed to the Writ.

N.B.—This writ is to be executed within four calendar months from the date thereof, including the day of such date and not afterwards.

A Warning to the Defendant.

1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a defendant, being arrested on this writ, shall have made a deposit of money, according to the statute 7 & 8 Geo. 4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

3. If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail bond.

4. If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

Indorsements to be made on the Writ of Capias.

Bail for £ , by affidavit.

Or

Bail for £ , by order of [naming the judge making the order], dated the day of .

This writ was issued by E. F., of , attorney for the plaintiff [or plaintiffs] within named.

Or

This writ was issued in person by the plaintiff within named, who resides at , [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.]

(2.) *Form of Writ of Detainer.*

VICTORIA, &c.: To the keeper of our prison, called the Queen's Prison. We command you that you detain C. D., if he shall be found in your custody at the delivery hereof to you, and him safely keep in an action of promises, [or, of debt, &c., as the case may be,] at the suit of A. B., until he shall be lawfully discharged from your custody. And we do further command you, that on receipt hereof you do warn the said C. D. by serving a copy hereof on him, that within eight days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him, in our Court of , to the said action, and that, in default of his so doing, the said A. B. may declare against him before the end of the term next after his detainer, and proceed thereon to judgment and execution. And we do further command you, the said keeper, that immediately after the service hereof you do return this our writ, or a copy hereof, to our said court, together with the day of the service hereof. Witness , at Westminster, the day of .

N. B.—*This writ is to be indorsed in the same manner as the writ of capias, but not to contain the warning on that writ.*

(b) *Declaration.*—If the defendant has appeared in person, the copy of the declaration may be delivered to the keeper or gaoler for the defendant,⁽¹⁾ in which way all notices and papers in the cause may be served;⁽²⁾ and the defendant need not be brought up by *habeas corpus* to be charged with the declaration.⁽³⁾ When the defendant has been arrested under a *capias*, it is enough to file the declaration.⁽⁴⁾ If the defendant has employed an attorney merely to put in bail for him, delivering a copy of the declaration to such attorney is insufficient.⁽⁵⁾ If the defendant is in *criminal* custody, and the action is in the Queen's Bench, leave of the court or a judge must be obtained to charge him with the declaration;⁽⁶⁾ otherwise it is an irregularity.⁽⁷⁾ But this leave is not granted, if the defendant is in any other criminal

(1) 4 & 5 Will. 3, c. 21; 1 T. R. 191; R. E. 5 Will. 3, r. 3, s. 7.

(2) *Whitehead v. Barber*, 1 Str. 248.

(3) *Ibid.*; *Barnett v. Harris*, 2 Dowl. 186; *Millard v. Millman*, 3 M. & Sc. 63; 2 Dowl. 723.

(4) *Neale v. Snoulton*, 2 C. B. 322.

(5) *Dent v. Halifax*, 1 Taunt. 493; *Spencer v. Newton*, 6 A. & E. 630; 1 N. & P. 827.

(6) *Cracknell v. Thomson*, 1 Salk. 354; *Ramsden v. Macdonald*, 1 Wils. 217; 1 W. Bl. 30; *Coppin v. Gunnell*, 2 Lord Raym. 1572; 2 Str. 873; *Altroffe v. Lunn*, 9 B. & C. 375; *Ess v. Smith*, 3 Tyr. 363; 1 Dowl. 703.

(7) *Williams v. Scudamore*, 1 Chit. R. 368.

custody than that of the sheriff or keeper of the Queen's prison.⁽¹⁾ The leave is generally granted as a matter of course ;⁽²⁾ and the judge's signature to the writ of habeas is sufficient evidence of it.⁽³⁾ A *habeas corpus ad respondendum* is then sued out of the Crown side of the court, and he is brought up and charged with the declaration. If the action is in the Common Pleas and Exchequer, this leave cannot be obtained from those courts, and the only course is to wait till the criminal custody expire.⁽⁴⁾

Forcing on trial, &c.]—"The plaintiff shall proceed to trial or final judgment⁽⁵⁾ against a prisoner in the term next after issue is joined, or at the sittings or assizes next after such term, unless the court or a judge shall otherwise order, and shall cause the defendant to be charged in execution within the term next after such trial or judgment."⁽⁶⁾ The plaintiff is only bound by this rule, where the prisoner is detained at his suit.⁽⁷⁾ "After notice given to any plaintiff by a prisoner of his intention to apply for his discharge under any Act for the Relief of Insolvent Debtors, no such prisoner shall be superseded or discharged out of custody at the suit of such plaintiff, by reason of such plaintiff's forbearing to proceed against him according to the rules and practice of the court from the time of such notice given, until some rule or order shall be made in the cause in that behalf."⁽⁸⁾ The prisoner will not obtain the benefit of this rule, if the delay is that of the court or his own.⁽⁹⁾

(c) *Charging in execution.*]—The plaintiff may sue out a *fi. fa.* against the prisoner's goods, without this operating as a discharge ;⁽¹⁰⁾ and if only part is levied, he may charge the

(1) *Guthrie v. Ford*, 4 D. & R. 271; *Jones v. Danvers*, 5 M. & W. 234; 7 Dowl. 394.

(2) *Foxworthy's case*, 7 Mod. 153; 2 Lord Raym. 848.

(3) *Gibb v. King*, 1 C. B. 1; 2 D. & L. 806.

(4) *Ibid.*; *Walsh v. Davies*, 2 N. R. 245; *Freeman v. Weston*, 8 Moore, 81; 1 Bing. 221.

(5) i. e. a judgment not after verdict: *Wrigglesworth v. Wright*, 13 East, 167.

(6) Rule Pr. 124, H. T. 1853.

(7) *Hall v. Wetherell*, 2 Sc. N. R. 196.

(8) Rule Pr. 128, H. T. 1853.

(9) *Huggins v. Bainbridge*, Barnes, 383; *Myers v. Cooper*, 2 Dowl. 423; *Grimes v. Joseph*, 2 B. & B. 35.

(10) *Jones v. Tye*, 1 Dowl. 181. See cases in next page.

prisoner in execution for the residue.⁽¹⁾ Where the defendant is a prisoner; a *fi. fa.* is not sued out, and he must be charged in execution unless protected by the Bankrupt or Insolvent Acts.⁽²⁾ He must be so charged "within the term next after the trial or final judgment."⁽³⁾ This time is calculated from the signing of judgment;⁽⁴⁾ and if the judgment is signed in term or vacation, the defendant must be charged in the following term.⁽⁵⁾ The rule applies only where the defendant is imprisoned at the plaintiff's suit.⁽⁶⁾ Delay on the plaintiff's part is excused by delay of the defendant; as where defendant proceeds in error or for an injunction,⁽⁷⁾ or pleads to a *scire facias*,⁽⁸⁾ or is put in criminal custody,⁽⁹⁾ or commences a negotiation for a settlement.⁽¹⁰⁾ An action on the judgment is not equivalent to charging in execution.⁽¹¹⁾ Where the defendant is in custody for contempt of the Common Pleas, he may be charged in execution in the usual way.⁽¹²⁾ Before charging in execution, it is unnecessary to enter the proceedings on any roll.⁽¹³⁾

If in Queen's prison.]—"It shall not be necessary in any case to sue out a writ of *habeas corpus ad satisfaciendum* to charge in execution a person already in the prison of the court, but such person may be so charged in execution by a judge's order, made upon affidavit, that judgment has been signed and is not satisfied; and the service of such order upon the keeper of the prison for the time being shall have the effect of a detainer."⁽¹⁴⁾

(1) *Green v. Foster*, 2 Dowl. 191.

(2) *Sloman v. Williams*, 4 D. & L. 49.

(3) Rule Pr. 124, H. T. 1853, *ante*, p. 721.

(4) *Collson v. Hall*, 5 Dowl. 534. See *ante*, p. 507.

(5) *Thorn v. Leslie*, 8 A. & E. 195; *Baxter v. Bailey*, 3 M. & W. 415.

(6) *Hall v. Wetherall*, 2 Sc. N. R. 196.

(7) *Garrett v. Mantell*, 2 Wils. 380; *Stonehurst v. Ramaden*, 1 B. & Ald. 676; *Maitland v. Mazaredo*, 6 M. & S. 139; *Laroché v. Wasborough*, 2 T. R. 737.

(8) *Ribbins v. Mantell*, 2 Wils. 378.

(9) *Freeman v. Weston*, 1 Bing. 221.

(10) *Walter v. Stewart*, 3 Wils. 455; *Pitt v. Yulden*, 4 Burr. 2068; *Melton v. Hewitt*, 1 Cr. & M. 579; 2 Dowl. 71.

(11) *Childes v. Prowse*, Barnes, 390; *Maud v. Braithwaite*, 2 Str. 243.

(12) *Wade v. Wood*, 1 C. B. 462.

(13) C. L. P. Act, 1852, s. 206; Rule Pr. 70, H. T. 1853. See *ante*, p. 509.

(14) *Ibid.* r. 127.

Form of Affidavit.[*Title of court and cause.*]

I, P. A., of _____, the attorney of the plaintiff in this action, make oath and say

1. That C. D., the above named defendant, is now a prisoner in the Queen's prison [or prison of this court].

2. That final judgment was signed in this action for the plaintiff on _____, for £ _____, and that the said judgment is not satisfied, but that the sum of £ _____, and interest thereon, is still due and owing to the plaintiff.

3. That the said plaintiff is desirous of having the said C. D. charged in execution for the said £ _____, and interest thereon, at four per cent. from the said _____ day of _____ 18 ____.

If the defendant is in the Queen's prison at the plaintiff's suit⁽¹⁾ the mode of charging him in execution is as follows. A side-bar rule to acknowledge the custody is obtained at the Master's office, and taken to the keeper, who writes an acknowledgment thereon, which must be dated in the same term as defendant is charged in execution.⁽²⁾ A *committitur* piece is then made out on plain parchment, and filed with the clerk of the judgments. If the *committitur* is wrong, it may be abandoned, on notice given to the defendant.⁽³⁾

Form of Committitur Piece.

(*Venue*) } C. D. is committed to the custody of the keeper of the
to wit. } Queen's prison, in an action at the suit of A. B., there
to remain until, &c.

Judgment of the _____ day of _____ 18 ____
P. A., Attorney. Roll _____.

If in sheriff's custody.—If the defendant is in the sheriff's custody, a *ca. sa.* is sued out in the usual manner, and lodged with the sheriff,⁽⁴⁾ or his town agent.⁽⁵⁾ It seems a warrant directed to the gaoler or officer is also necessary.⁽⁶⁾ It is unnecessary for this purpose to remove the prisoner into the

⁽¹⁾ *Furnival v. Stringer*, 5 N. & M. 60.

⁽²⁾ *Fisher v. Stanhope*, 7 T. R. 464.

⁽³⁾ *Cunningham v. Cohen*, 10 East, 46.

⁽⁴⁾ *Owen v. Owen*, 2 B. & Ad. 805; 1 Dowl. 384, 385.

⁽⁵⁾ *Williams v. Waring*, 4 Dowl. 200; 2 C. M. & R. 354.

⁽⁶⁾ *Pool v. Cook*, Barnes, 389; *Astley v. Goodyer*, 2 Dowl. 619.

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Queen's prison.⁽¹⁾ If the sheriff is the plaintiff, the *ca. sa.* may be directed to the coroner, who may hand it to the gaoler.⁽²⁾

(d) *Discharge by Supersedeas.*

In what cases.]—A prisoner is entitled to a *supersedeas*, if the plaintiff neglect to proceed to trial and final judgment, and to charge him in execution, within the times specified, *ante*, p. 721. But where the prisoner's estate has been vested in a provisional assignee under 1 & 2 Vict. c. 110, s. 41, he is not entitled to a *supersedeas* for any neglect of the plaintiff in not proceeding in any action, as to which that act would protect him. Yet a prisoner, who, at the time of a vesting order made on the petition of a creditor, was entitled to his discharge on the ground of the lapse of a year, without the plaintiff's declaring, is entitled to his discharge, notwithstanding this section.⁽³⁾

"If, by reason of any writ of error, special order of the court, agreement of parties, or other special matter, any person detained in the actual custody of the keeper of the Queen's prison, be not entitled to a *supersedeas* or discharge for want of proceeding to trial, or judgment, or charging in execution within the times prescribed, then and in every such case the plaintiff or plaintiffs, at whose suit such prisoner shall be so detained in custody, shall, with all convenient speed, give notice in writing of such writ of error, special order, agreement, or other special matter to the keeper, upon pain of losing the right to detain such prisoner in custody by reason of such special matter; and the keeper shall forthwith, after the receipt of such notice, cause the matter thereof to be entered in the books of the prison, and shall also present to the judges of the respective courts, from time to time, a list of the prisoners to whom such special matter shall relate, showing such special matter, together with the list of the prisoners supersedeable."⁽⁴⁾

⁽¹⁾ *Owen v. Owen*, 2 B. & Ad. 805; 1 Dowl. 384, 385; *Deemer v. Brooker*, 3 Dowl. 576.

⁽²⁾ *Bastard v. Trutch*, 3 A. & E. 451; 5 N. & M. 109; 4 Dowl. 6.

⁽³⁾ *Hallett v. Cresswell*, 3 D. & L. 561.

⁽⁴⁾ Rule Pr. 126, H. T. 1853.

Form of Notice to the Keeper.

In the Q. B. ["C. P.," or "Exch. of P."]

Between A. B., plaintiff,
and

C. D., (a prisoner), defendant.

Take notice that (*here state the special matter*), and that on account of the premises the plaintiff has not proceeded to trial (*or, as the case may be*), within the time prescribed by the rules and practice of the court in that behalf. Dated, &c.

To the Keeper, &c.

P. A.

If the prisoner is once supersedeable, he is always supersedeable,⁽¹⁾ unless he has expressly waived his option.⁽²⁾ Hence, he cannot be charged in execution after the time has expired, unless he had been already charged in execution and neglected an opportunity to apply for a *supersedeas*.⁽³⁾ He may, however, be sued on the judgment, and again taken on a *ca. sa.* thereon.⁽⁴⁾

"The keeper of the Queen's prison shall present to the judges of the courts in their respective chambers at Westminster, within the first four days of every term, a list of all such prisoners as are supersedeable, showing as to what actions and on what account they are so, and as to what actions (if any) they still remain not supersedeable."⁽⁵⁾ "All prisoners, who have been or shall be in the custody of the keeper for the space of one calendar month, after they are supersedeable, although not superseded, shall be forthwith discharged out of the Queen's prison as to all such actions in which they have been or shall be supersedeable."⁽⁶⁾

How to obtain a supersedeas.]—In order to obtain a *supersedeas* in the Queen's prison, the course is to obtain from the clerk at the prison a copy of the causes the defendant is charged with. A summons is then taken out at chambers, and served, calling on the plaintiff or his attorney to show cause why the defendant should not be discharged. The plaintiff's attorney may then consent to an order being

⁽¹⁾ *Melton v. Hewitt*, 2 Dowl. 71; *Colbron v. Hall*, 5 Dowl. 534; *Hallett v. Cresswell*, 3 D. & L. 561.

⁽²⁾ *Pearson v. Rawlings*, 1 East, 77; *Williams v. Scudamore*, 1 Chit. R. 386.

⁽³⁾ *Ross v. Christfield*, 1 T. R. 591; *Morris v. Magrath*, 3 B. & B. 301; 7 Moore, 154.

⁽⁴⁾ *Topping v. Ryan*, 1 T. R. 275; *Blandford v. Toot*, Cowp. 72; *Ismay v. Dewin*, 2 W. Bl. 982.

⁽⁵⁾ Rule Pr. 126, H. T. 1853.

⁽⁶⁾ *Ibid.* 127.

made, which consent is indorsed on the summons, and the order is made in the usual way. If the attorney do not attend, the judge, on an affidavit of service, will make the order. A copy of the order is served, and the order is taken to the keeper, who will thereupon discharge the prisoner.

Form of Writ of Supersedeas for not Declaring.

VICTORIA, &c.: To the Keeper of the Queen's Prison, [or, to the Sheriff of ,] greeting: Whereas, C. D. was on arrested by the then sheriff of the county of , under and by virtue of our writ of *capias*, to the said sheriff directed, and which issued out of our Court of against the said C. D., in an action at the suit of A. B., and the said C. D. is now detained in our prison in your custody, by virtue of the said writ. And, whereas, the writ of summons by which the said action was commenced issued out of the said court on , and the defendant was duly served with a copy thereof on . And, because the said A. B. hath not declared against the said C. D., in the said action, within one year after the day and year last aforesaid, therefore we command you, that if the said C. D. be detained in our prison under your custody, by virtue of the said first-mentioned writ, and for no other cause, then do you immediately discharge the said C. D. out of your custody, and permit him to go at large, as you will answer the contrary at your peril. Witness [name of chief of the court] at Westminster, the day of , in the year of our Lord .

If the prisoner is in the custody of the sheriff, the gaoler is applied to for a certificate of the causes, and an affidavit is made of his signature. A summons is then taken out, and served as above. When the order is made, the *supersedeas*, written on plain parchment, and a *præcipe* thereof are taken to the Master, who signs the *supersedeas*, and this being left with the sheriff, the prisoner will be discharged.

Form of Gaoler's Certificate of Causes.

I, K. G. keeper of Her Majesty's gaol, in and for the of , hereby certify that C. D. was on last committed to the said gaol, by virtue of a writ of *capias*, in an action at the suit of A. B., dated , and that since the said commitment no declaration against the said C. D., at the suit of the said A. B., hath been delivered to me or my turnkey, [or, as the case may be] and that no writ of *habeas corpus* hath been brought for the removal of the said C. D. Given under my hand, the day of , 18 .

Witness W. G.

K. G.

Form of Affidavit of Gaoler's Signature.

[Title of court and cause.]

I, W. G., of , make oath and say, that on I was present

and saw K. G., keeper, &c., subscribe his name to the certificate hereunto annexed, and that at the same time I subscribed the name thereto annexed, which is my name and in my handwriting.

Sworn, &c.

W. G.

(e) *Discharge under Small Debtors Act.*—The Small Debtors Act, 48 Geo. 3, c. 123, was passed to relieve from prison, after twelve months, those whose debt is under 20*l.*; but since the act was passed, a *ca. sa.* can seldom be issued for so small an amount.⁽¹⁾ “All persons in execution upon any judgment, in whatsoever court the same may have been obtained, and whether such court be or be not a court of record for any debt or damages not exceeding the sum of 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months next before the time of their application to be discharged as hereinafter mentioned, shall and may upon his, her, or their application for that purpose in term time, made to one of His Majesty’s superior courts of record, at Westminster, to the satisfaction of such court, be forthwith discharged out of custody, as to such execution by the rule or order of such court.”⁽²⁾ This statute applies to plaintiffs.⁽³⁾ It applies only to civil actions;⁽⁴⁾ but not to *quasi* criminal proceedings, as attachment,⁽⁵⁾ or a writ *de contumace capiendo*.⁽⁶⁾ It applies to actions for damages, as *trover*,⁽⁷⁾ for assault,⁽⁸⁾ for *crim. con.*,⁽⁹⁾ and also ejection.⁽¹⁰⁾ It applies also to executions under rules of court.⁽¹¹⁾ The debt must be less than 20*l.* at the time of action brought; and hence, though the original debt may have been less, yet if, with interest accruing after action, it exceed that amount, the prisoner is not entitled to his discharge.⁽¹²⁾ The imprison-

(1) 7 & 8 Vict. c. 96, s. 57; see *ante*, “*Ca. sa.*”

(2) 48 Geo. 3, c. 123, s. 1.

(3) *Roylance v. Hewling*, 3 M. & Sel. 182; *Bradley v. Webb*, 7 Dowl. 588.

(4) *R. v. Hubbard*, 10 East, 408; *Lewis v. Moreland*, 2 B. & Ald. 61.

(5) *Ibid.*; *Pitt v. Evans*, 3 Dowl. 649; *R. v. Clifford*, 8 D. & R. 58.

(6) *Ex parte Kaye*, 1 B. & Ad. 652.

(7) *Smith v. Preston*, 1 H. & Wol. 93.

(8) *Winter v. Elliott*, 1 A. & E. 24; 3 N. & M. 315.

(9) *Goodfellow v. Robings*, 3 Bing. N. C. 1; 5 Dowl. 198.

(10) *Doe d. Symons v. Price*, 2 D. & L. 752.

(11) *Doe d. Smith v. Ros*, 6 D. & L. 544.

(12) *Cooper v. Bliss*, 2 Dowl. 749; 3 M. & Sc. 797; see *Rathbone v. Fowler* 6 Dowl. 81; 3 M. & W. 137.

ment must have been continuous up to the application.⁽¹⁾ It is reckoned inclusive of the day when prisoner was charged in execution.⁽²⁾ The statute does not interfere with execution against the property of the prisoner;⁽³⁾ nor does it affect, or is it affected by the Insolvent Debtor's Act, 1 & 2 Vict. c. 110, ss. 36, 41.⁽⁴⁾

Who, where, and how to apply.—The prisoner must himself apply, and not a third party;⁽⁵⁾ though, if he is a lunatic, his wife may do so.⁽⁶⁾ He must apply to the court, and not at chambers.⁽⁷⁾ Where the judgment is that of an inferior court, any of the superior courts may be applied to.⁽⁸⁾ “A rule or order for the discharge of a prisoner who has been detained in execution a year, for a sum under twenty pounds, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires.”⁽⁹⁾ Where the notice was served on the 3rd, stating that the motion would be made on the 12th, or as soon as counsel could be heard, and counsel was not heard till the 14th, the notice was held insufficient.⁽¹⁰⁾

Form of Notice of Intention to Apply for Discharge.

[*Title of court and cause.*]

Take notice, that I shall on next, or as soon after as I [or counsel] can be heard in this behalf, make application to Her Majesty's Court of , at Westminster, for my discharge out of the custody of , as to this action at your suit, according to the statute in such case made and provided, my imprisonment having been for the space of twelve calendar months in execution upon the judgment herein obtained by you for debt and damages not exceeding the sum of twenty pounds, exclusive of costs, and I have annexed hereto a copy of the affidavit upon which I shall ground the said application. Dated, &c.

A. B.

C. D.

(1) *Eiffe v. Jacob*, 9 Dowl. 343; *Stubbing v. McGrath*, 7 Dowl. 328.

(2) *Parkers v. Wilkins*, 7 Dowl. 152.

(3) *Ex parte Kaye*, 1 B. & Ald. 653.

(4) *Chew v. Lye*, 7 Dowl. 465; *Fuge v. Rogers*, 1 D. & L. 713; *Clapperton v. Monteith*, *ibid.* 909; *Hopkins v. Plodger*, *ibid.* 119; *Kitching v. Croft*, 12 A. & E. 586.

(5) *Wood v. Heath*, 4 M. & Gr. 918; 2 Dowl. N. S. 651.

(6) *Clay v. Bowler*, 6 N. & M. 814.

(7) *Kelly v. Dickenson*, 1 Dowl. 546; *Jones v. Fitzadam*, 1 Cr. & M. 856.

(8) *Short v. Williams*, 4 Dowl. 357.

(9) Rule Pr. 129, H. T. 1853.

(10) *Burley v. Worrall*, 1 D. & L. 145.

The notice must correctly state the name of the cause.⁽¹⁾ It must in general be served on the plaintiff, unless he cannot be found, or unless the attorney continues to act in the matter.⁽²⁾ Service on one of the plaintiffs suffices.⁽³⁾ If the plaintiff is dead, service on his representatives, if there are any, or his wife, is necessary.⁽⁴⁾ Where the residence of the plaintiff and his attorney were both unknown, it was held sufficient to serve the notice on the attorney's successors in business, who stated they were concerned in other matters for the plaintiff, and would oppose the discharge.⁽⁵⁾ A copy of the affidavit, on the application, is generally served with the notice.⁽⁶⁾

The gaoler's or keeper's certificate of the commitment and causes must be obtained before the application, and an affidavit made of the signature. There must also be an affidavit of the prisoner's signature to the notice;⁽⁷⁾ and the prisoner must make an affidavit, properly intituled in the cause, as to the amount of the debt and the length of the imprisonment.⁽⁸⁾

Form of Affidavit.

[*Title of court and cause.*]

I, C. D., the above-named defendant, now a prisoner in _____, make oath and say

1. That on _____ A. B., the above-named plaintiff obtained a judgment in this suit against me for £ _____, exclusive of costs.

2. That on _____ I was charged in execution upon the said judgment, at the suit of the said plaintiff, and have ever since been detained in custody, and have lain in prison in _____, in execution upon the said judgment.

3. That on _____ I did serve the above-named plaintiff [personally] with a notice signed by me, a true copy whereof is hereunto annexed.
Sworn, &c. _____ C. D.

If no previous notice of the application be given, the rule is a rule nisi only,⁽⁹⁾ which is served in the same manner as the ten days' notice.⁽¹⁰⁾ The court cannot make the rule

(1) *Kelly v. Dickenson*, 1 Dowl. 546.

(2) *George v. Fry*, 4 Dowl. 273; *Johnson v. Routledge*, 5 Dowl. 579; *Percival v. Russell*, 7 M. & Gr. 448, 526.

(3) *Harris v. Turtle*, 8 M. & W. 258.

(4) *Ex parte Richer*, 4 Dowl. 275; 1 H. & Wol. 518.

(5) *Jones v. Boddington*, 2 D. & L. 30.

(6) *Wilcox v. Leman*, 8 Dowl. 144.

(7) *Randall v. Sweet*, 10 L. J. 132, C. P.

(8) *Clapperton v. Monteith*, 6 M. & Gr. 909; 1 D. & L. 713.

(9) *Ex parte Neilson*, 7 Taunt. 37, 467; *Moore v. Clay*, 4 Dowl. 5.

(10) *Bolton v. Allen*, 1 Dowl. N. S. 309.

returnable at chambers.⁽¹⁾ Where the ten days' notice has been improperly served, the prisoner may still apply for a rule *nisi*.⁽²⁾ The plaintiff may, notwithstanding the discharge of the prisoner under this act, proceed with execution against the lands or goods (except his wearing apparel, tools, &c., to the value of 10*l.*,)⁽³⁾ of the prisoner, in the same manner as if the prisoner had never been taken or charged in execution; and he cannot be a second time taken in execution on the same judgment, unless the discharge was unduly or fraudulently obtained.⁽⁴⁾ In the latter case the plaintiff may apply to the court for leave to sue out a new *ca. sa.*

(*f*) *Discharge by plaintiff's death, or discontinuance of action.*—Where a plaintiff, at whose suit a defendant is in prison, dies and leaves no personal representative, or none who will administer, the prisoner may apply for a rule *nisi* for his discharge, which rule may be served on the plaintiff's next-of-kin.⁽⁵⁾ The court may, in suspicious circumstances, refer to the Master, to inquire for the next-of-kin.⁽⁶⁾ An attorney's lien for costs will not be allowed to stand in the way of the discharge,⁽⁷⁾ unless the attorney has a lien on grounds independent of the action (as where he advanced money to the plaintiff, who authorized the attorney to pay himself out of the money recovered in the action), and where such attorney states his intention to take out administration.⁽⁸⁾ Where a personal representative however exists, his consent is required before the court will discharge the defendant, even though eighteen months had elapsed from the plaintiff's death.⁽⁹⁾

The defendant will also be discharged where the action is discontinued or abated, or where the defendant compromises or settles the debt,⁽¹⁰⁾ or where any third party pays it for him;⁽¹¹⁾ and the plaintiff is bound to grant a discharge, other-

(1) *Jones v. Fitzadams*, 2 Dowl. 111; 1 Cr. & M. 855.

(2) *Johnson v. Routledge*, 5 Dowl. 579.

(3) *O'Hare v. Reeves*, 13 Q. B. 659.

(4) 48 Geo. 3, c. 128, s. 1.

(5) *Gore v. Wright*, 1 Dowl. N. S. 864; *Taylor v. Burgess*, 16 M. & W. 781.

(6) *Ridsdale v. Latour*, 2 L. M. & P. 318.

(7) *Camp v. Pote*, 8 C. B. 375.

(8) *Cox v. Prichard*, 2 L. M. & P. 298.

(9) *Fothergill v. Walton*, 4 Bing. 711; 1 M. & P. 743; *Dunsford v. Gouldsmith*, 8 Moore, 145. See where defendant's wife was administratrix of the plaintiff; *Pyne v. Earl*, 8 T. B. 407.

(10) See *Butt v. Conant*, 3 B. & B. 3; 6 Moore, 65.

(11) *Reimer v. Turner*, 3 Dowl. 601.

wise an action on the case may lie against him.⁽¹⁾ Where, however, the plaintiff sues for the benefit of other parties, he cannot discharge the defendant collusively, otherwise an attachment will lie against him.⁽²⁾ Where a plaintiff was in execution for costs, and defendant absconded, and his attorney consented to the discharge, the court held they had no power to discharge the plaintiff.⁽³⁾ Where a party was imprisoned for a libel, and afterwards reversed the judgment on error, he was held entitled to his discharge.⁽⁴⁾

Discharge by bankruptcy or insolvent court.—Where the defendant while in execution is made a bankrupt, he may obtain his discharge, the rights of the plaintiff being reserved, except as to execution of *ca. sa.*⁽⁵⁾

So the prisoner may obtain his discharge by means of the Insolvent Debtors Acts.⁽⁶⁾

2. Actions against Keeper of Queen's Prison.

It is the privilege of the keeper of the Queen's prison to be sued in the Queen's Bench, otherwise he may plead his privilege in abatement.⁽⁷⁾ He is responsible for the acts and omissions of his deputy-keeper.⁽⁸⁾ Case and not debt is the proper action against him for an escape.⁽⁹⁾ A retaking on fresh pursuit must be specially pleaded, and there must be added to the plea an affidavit that the party escaped without the defendant's consent, privity, or knowledge.⁽¹⁰⁾ When he is sued for a negligent escape, it is a good plea, that the party was retaken, or had returned into custody before the writ issued; though not if the escape was voluntary, that is, with the consent of the keeper.⁽¹¹⁾ The plaintiff may, by judge's order, be compelled to give a particular of the

(1) *Crozer v. Pilling*, 6 D. & R. 129; 4 B. & C. 26.

(2) *McGregor v. Barrett*, 6 C. B. 262.

(3) *Pearce v. Skaif*, 6 C. B. 200.

(4) *Holt v. Reginam*, 2 D. & L. 774.

(5) See 11 & 12 Vict. c. 106, ss. 112, 205, 211; *Larkin v. Marshall*, 1 L. M. & P. 186; *Allcard v. Wesson*, 7 Exch. 753; *Clark v. Smith*, 3 C. B. 982; *Wearing v. Smith*, 9 Q. B. 1024.

(6) 1 & 2 Vict. c. 110, ss. 75, *et seq.*, 5 & 6 Vict. c. 116; 7 & 8 Vict. c. 96; 8 & 9 Vict. c. 127; 10 & 11 Vict. 102; *Harvey v. Hudson*, 5 Exch. 845; *Ex parte Violet*, 10 C. B. 891; *Howard v. Hudson*, 2 E. & B. 1; *Thomas v. Hudson*, 14 M. & W. 353; 16 M. & W. 885; *Hookpayton v. Bussell*, 9 Exch. 279.

(7) Br. Abr. "Bille" pl. 29.

(8) 11 & 12 Vict. c. 7, s. 4; 5 & 6 Vict. c. 22.

(9) 5 & 6 Vict. c. 98, s. 31.

(10) 8 & 9 Will. 3, c. 27, s. 6.

(11) *Bonafous v. Walker*, 2 T. R. 131.

escape, stating the precise date thereof, if known ;⁽¹⁾ while, on the other hand, the plaintiff's attorney may obtain an order to inspect the writ of *habeas corpus* and return, and the committitur indorsed thereon.⁽²⁾ The keeper may be served with a side-bar rule to produce the defendant in court ; and if the latter has escaped, he must give notice thereof to the plaintiff's attorney within the time limited by the rule.⁽³⁾ It is an escape in law if, after one day's notice in writing, the keeper refuse to show the prisoner to the creditor, or to the attorney of the creditor at whose suit process was sued out.⁽⁴⁾ And the keeper may be fined 50*l.*, if on demand he refuse to give to a person desiring to charge a prisoner in execution a note in writing, stating whether such prisoner is in his custody or not.⁽⁵⁾

(a) *Removing Prisoners from other Custody into the Queen's Prison.*

A prisoner may be removed from the custody of the sheriff or other person, into that of the keeper of the Queen's prison, by a *habeas corpus*.

Habeas corpus cum causâ.]—Where the custody is in some other prison than the Queen's prison, under the process of the superior court, the prisoner has an absolute right to have himself removed into the Queen's prison by a *habeas corpus cum causâ*, even though he is detained in a prison named by an order of the Insolvent Court.⁽⁶⁾ He is not stopped by taking this step from disputing the legality of the custody.⁽⁷⁾ The writ may be sued out in term or vacation, but must bear teste in term. It may be made returnable immediately.⁽⁸⁾ It is signed by the chief, or, in his absence, by one of the other judges of the court.⁽⁹⁾ The name and address of the attorney, with the date of issuing, should be indorsed on the writ.⁽¹⁰⁾

(1) *Davis v. Chapman*, 1 N. & P. 699; *Webster v. Jones*, 7 D. & R. 744.

(2) *Fox v. Jones*, 7 B. & C. 732; 1 M. & R. 570.

(3) *White v. Stratton*, 1 Dowl. 550.

(4) 8 & 9 Will. 3, c. 27, s. 8.

(5) Sect. 9.

(6) *Samuel v. Nettleship*, 3 Q. B. 188; 2 G. & D. 770.

(7) *Pearson v. Yewens*, 7 Sc. 435.

(8) *Bettesworth v. Bell*, 3 Burr. 1875; *Case of Leonard Watson*, 9 A. & E. 731.

(9) 1 & 2 P. & M. c. 13, s. 7; *R. v. Rodham*, Cowp. 672.

(10) *Sheppard v. Shum*, 2 Cr. & J. 632.

Form of Writ of Habeas Corpus cum Causâ.

VICTORIA, &c. : To the _____, greeting : We command you that you have the body of C. D., detained in our prison under your custody, as it is said, under safe and secure conduct, together with the day and cause of his being taken and detained, by whatsoever name he may be called in the same, before our right trusty and well-beloved _____, [chief of court, adding the usual description] at his chambers, in Rolls Garden, Chancery Lane, [or at his house at _____,] immediately after the receipt of this writ, to do and receive all and singular those things which our said chief _____ shall then and there consider of him in this behalf, and have you there then this writ. Witness _____, [name of chief] at Westminster, the _____ day of _____, in the year of our Lord _____.

The writ is engrossed on plain parchment, and taken, along with a præcipe, to the Master's office to be stamped and signed. It is then left with the officer or keeper, generally four days before the defendant is to be brought up, and the fees are paid. (1)

How obeyed.]—The gaoler or officer must take the prisoner to the judge's chambers, in due and convenient time, (2) direct, (3) and without allowing a rescue, otherwise he may be sued for an escape. (4) The judge at chambers then commits him to a tipstaff to be taken to the Queen's prison. (5) The officer who executes the writ keeps it. (6) If the officer do not obey the writ, he is liable to an attachment, (7) after being ruled to return the writ. (8)

Habeas corpus ad satisfaciendum.]—When the plaintiff wants to charge in execution the defendant, who is detained in some other prison at the suit of a third party, he must bring the defendant into the Queen's prison on a writ of *habeas corpus ad satisfaciendum*. (9) Where, however, the defendant is in the county gaol, he may be charged by a *ca. sa.*, and the court will exercise a discretion as to granting a

(1) *Parke v. Torre*, 3 B. & B. 93; 6 Moore, 260.

(2) *Bettesworth v. Bell*, 3 Burr. 1875.

(3) R. M. 1654, ss. 7, 10; Tidd, 349.

(4) *Compton v. Ward*, 1 Str. 429.

(5) *Re Salisbury*, 5 B. & Ald. 266.

(6) *Cooper v. Jones*, 2 M. & Sel. 202.

(7) *R. v. Winton*, 5 T. R. 89.

(8) *R. v. Wright*, 2 Str. 915.

(9) *Sandys v. Hornby*, 5 N. & M. 59; *Furnival v. Stringer*, 3 So. 551; 5 Dowl. 195.

habeas corpus.⁽¹⁾ The writ is tested in term, and, it seems, must be returned on a day certain in term; and the issuing of the writ admits the original custody to be legal.⁽²⁾ No affidavit is necessary on the application.⁽³⁾ It need not issue against other defendants if not in custody.⁽⁴⁾ It is sued out as the *habeas corpus cum causâ*, and a duplicate left with the officer four days before the return day. The officer cannot detain the prisoner till payment of the court fees of the writ.⁽⁵⁾ When the prisoner is brought into court, the original *habeas* is handed to the Master, who charges the prisoner.⁽⁶⁾ The prisoner, when brought up on this writ, is entitled to be discharged on paying the debt and costs, without the court fees of the writ.⁽⁷⁾

Form of Habeas Corpus ad Satisfaciendum.

— have before us, [or in C. P. before our justices; or in Exch. before the barons of our Exchequer] at Westminster, on the day of , the body of C. D., detained, &c., to satisfy A. B. £ , which the said A. B. lately in our court before us, [or before our justices aforesaid, or before the barons of our said Exchequer] at Westminster, recovered against the said C. D., whereof the said C. D. is convicted, together with interest, &c., &c., and further to do and receive all and singular, &c. [Conclude as in the form ante, p. 733.]

(1) *Williams v. Jones*, 2 Cr. & J. 611.

(2) *Newton v. Rowe*, 1 D. & L. 814; 7 Sc. N. R. 543.

(3) *Furnival v. Stringer*, 3 Sc. 551.

(4) *Wilson v. Bacon*, 1 Dowl. 118.

(5) *Dalzell v. Cullen*, 12 M. & W. 1; 1 D. & L. 448.

(6) *Aldridge v. Stafford*, 3 M. & Gr. 409.

(7) *Dalzell v. Cullen*, 12 M. & W. 1.

CHAPTER XIV.

CORPORATIONS AND QUASI CORPORATIONS.

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| <p>1. Corporations generally.</p> <p>2. Joint Stock Companies registered under 7 & 8 Vict. c. 110.</p> <p> (a) Plaintiffs.</p> <p> (b) Defendants.</p> <p> (c) Execution against shareholders.</p> <p>3. Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16.</p> <p> (a) Plaintiffs.</p> <p> (b) Defendants.</p> <p> (c) Execution against shareholders.</p> <p>4. Banking and other companies</p> | <p>suing and being sued by public officers.</p> <p>(a) Joint stock banks under 7 & 8 Vict. c. 113.</p> <p>(b) Actions, and execution against shareholders, under 7 Geo. 4, c. 46.</p> <p>(c) Suing and being sued generally by public officers.</p> <p>5. Companies incorporated by letters patent under 7 Will. 4 and 1 Vict. c. 73.</p> <p>6. Limited liability companies under 18 & 19 Vict. c. 133.</p> <p>7. Winding up of companies.</p> |
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1. *Corporations generally.*

Plaintiffs.—Corporations at common law must sue in their common name,⁽¹⁾ though by statute, in many cases, they may sue in the name of their public officer. They can only sue by attorney appointed under their common seal.⁽²⁾ The appointment of an attorney by a municipal corporation, except by the city of London, must be under the corporate seal;⁽³⁾ and the attorney of the corporation has an implied power to refer the cause to arbitration.⁽⁴⁾ A corporation cannot sue as

(¹) 1 Bl. Com. 474; *Bowen v. Morris*, 2 Taunt. 374; *Cooch v. Goodman*, 2 Q. B. 580. A foreign corporation may sue as such on proof of its being incorporated, *National Bank of Saint Charles v. De Bernales*, 1 C. & P. 569.

(²) Co. Litt. 66 b.

(³) *Arnold v. Mayor of Poole*, 5 Sc. N. R. 741; 2 Dowl. N. S. 574.

(⁴) *Faviell v. Eastern Counties Railway Company*, 2 Exch. 344. [C. L.—vol. ii.]

common informers.⁽¹⁾ But they may bring debt or *indebitatus assumpsit* on a bye law ;⁽²⁾ and in some cases *assumpsit*.⁽³⁾

Defendants.—Corporations are at common law sued in their corporate name, and by statute in the name of their public officer. The writ is "served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary."⁽⁴⁾ The corporation must defend by attorney appointed under their common seal.⁽⁵⁾ The declaration need not describe how they are incorporated, but merely describe them by their corporate name.⁽⁶⁾ Execution can in general issue only against the property of the corporation.⁽⁷⁾ In general, corporations can only be sued on a contract under their common seal, unless the particular contract is incidental to the proper business of the corporation, or of a very trifling nature.⁽⁸⁾ They cannot, it seems, be sued for malicious prosecution.⁽⁹⁾

(1) *Weavers' Company v. Forest*, 2 Str. 1241.

(2) *Tobacco Pipe Makers' Company v. Loder*, 16 Q. B. 765; *Barber Surgeons v. Pelson*, 2 Lev. 252.

(3) *Fishmongers' Company v. Robertson*, 6 Sc. N. & R. 56; *Arnold v. Mayor of Poole*, 5 Sc. N. B. 741; *Australian &c. Navigation Company v. Murzetti*, 11 Exch. 228. As to suing on an executory contract not under seal, see *Copper Miners' Company v. Fox*, 16 Q. B. 229; *Pennington v. Taniers*, 18 L. J. 49, Q. B.

(4) C. L. P. Act, 1852, s. 16, *ante*, p. 99.

(5) Co. Litt. 66 a, b; 10 Co. 30 b.

(6) *Woolf v. City Steam Boat Company*, 7 C. B. 103; 6 D. & L. 606.

(7) Bac. Abr. "Corp." E. 2.

(8) See examples of actions against corporations on contracts not under seal, *Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Arnold v. Mayor of Poole*, 5 Sc. N. B. 741; 4 M. & Gr. 860; *Henderson v. Australian &c. Navigation Company*, 5 E. & B. 409; *Sanders v. St. Neots Union*, 8 Q. B. 810; *Paine v. Strand Union*, 8 Q. B. 326; *Diggle v. London and Blackwall Railway Company*, 5 Exch. 442; *Pauling v. London and North Western Railway Company*, 8 Exch. 867; *Lamprell v. Billericay Union*, 3 Exch. 283; *Church v. Imperial Gas Company*, 6 A. & E. 846; *Lowe v. London and North Western Railway Company*, 18 Q. B. 632; *Smith v. Hull Glass Company*, 11 C. B. 897; *Clark v. Cuckfield Union*, 1 Bail. C. C. 81; for trespass, *Maund v. Monmouth Canal Company*, 5 Sc. N. B. 457; 4 M. & Gr. 452; 2 Dowl. N. S. 113; for assault, *Eastern Counties Railway Company v. Broom*, 6 Exch. 314; *Great Northern Railway Company v. Harrison*, 10 Exch. 376; *Roe v. Birkenhead &c. Railway Company*, 7 Exch. 36; for trover, *Glover v. London and North Western Railway Company*, 5 Exch. 66.

(9) *Stevens v. Midland Railway Company*, 10 Exch. 352. See the leading doctrines and authorities as to the powers of companies to bind themselves reviewed in *Hawkes v. Eastern Railway Company*, 5 H. L. Cas.; *Preston v. Lancashire and Yorkshire Railway Company*, *ibid.*

2. *Joint Stock Companies registered under 7 & 8 Vict. c. 110.*⁽¹⁾

The Joint Stock Companies Registration Act, 7 & 8 Vict. c. 110 (amended by 10 & 11 Vict. c. 78), confers upon certain companies the qualities and incidents of a corporation. Before advertising their intention to form such a company, the promoters must make a return to the registry office of certain particulars, viz: 1. the proposed name of the company, 2. the business or purpose of the company, 3. the names and additions of the promoters; "and upon such registration of at the least the three particulars above-mentioned, the promoters of the company shall be entitled to a certificate of provisional registration."⁽²⁾ Certain acts and contracts necessary for constituting the company may be done and made after provisional registration,⁽³⁾ and may be sued for after complete registration;⁽⁴⁾ but contracts made by promoters before provisional registration cannot be sued for.⁽⁵⁾ And the promoters must at that stage couple with their intended name the words "provisionally registered."⁽⁶⁾ The company become incorporated from and after the date of the certificate⁽⁷⁾ of complete registration made by the Registrar of Joint Stock Companies, and "thereupon any covenants or engagements entered into by any of the shareholders or other persons with any trustee on the behalf of the company, at any time before the complete registration thereof, may be proceeded on by the said company and enforced in all respects as if they had been made or entered into with the said company after the incorporation thereof; and such company shall continue so incorporated until it shall be dissolved, and all its affairs wound up; but so as not in any wise to restrict the liability of any of the shareholders of the company under any judgment, decree, or order for the payment of money which shall be obtained against such company, or any of the members thereof, in any action or suit prosecuted by or against such company in any court of law or equity, but every such shareholder shall, in respect of such moneys, subject as after mentioned, be and continue liable as he

⁽¹⁾ See also Index "Companies." ⁽²⁾ 7 & 8 Vict. c. 110, s. 4.

⁽³⁾ *Ibid.* s. 23; *Bull v. Chapman*, 8 Exch. 444.

⁽⁴⁾ *Taylor v. Crowland Gas Company*, 10 Exch. 293; *Barton v. Hutchinson*, 2 C. & K. 712.

⁽⁵⁾ *Hutchinson v. Surrey Consumers' Gas Company*, 11 C. B. 689.

⁽⁶⁾ *R. v. Whitmarsh*, 14 Q. B. 803.

⁽⁷⁾ The certificate is not void because some provisions for obtaining it may have been omitted: *Banwen Iron Company v. Barnett*, 8 C. B. 406.

would have been if the said company had not been incorporated ; and thereupon it shall be lawful for the said company, and they are hereby empowered as follows, that is to say, to use⁽¹⁾ the registered name of the company, adding thereto 'registered,' and also to have a common seal, with power to break and change the same from time to time, but on which must be inscribed the name of the company, and also to sue and be sued by their registered name in respect of any claim by or upon the company, upon or by any person, whether a member of the company or not, so long as any such claim may remain unsatisfied."⁽²⁾

(a) *Plaintiffs.*]—The company sue by their registered name, like corporations at common law.⁽³⁾ When a *call* is made upon a shareholder, the company are empowered, after complete registration,⁽⁴⁾ to sue him in an action of debt, and "in the declaration in any such action it shall be sufficient to state only, that at the time of the commencement of the suit the defendant, as the holder of certain shares (stating how many) in a certain company or undertaking, as the case may be (naming it), was indebted to the company in a certain sum (stating the amount of the instalment, or so much thereof as is sought to be recovered) for certain instalments of capital then due and payable in respect of the said shares, and that the defendant hath not paid the same ; and that if, upon the trial of any such action, it shall be proved that the defendant was the holder of any share, when such instalments, or any of them, in respect of the same and for which the action is brought, became due, then such company shall recover such instalments, or so much thereof as is due, together with interest for the same, at the rate of five pounds per cent. per annum, to be computed from the day on which such instalment shall have become due."⁽⁵⁾

(b) *Defendants.*]—The writ of summons should, it seems, state the corporation's place of business ; and "now or late at, &c.," has been held bad.⁽⁶⁾ The writ must be served

(1) But not to alter the name, *R. v. Joint Stock Companies*, 10 Q. B. 839.

(2) 7 & 8 Vict. c. 110, s. 25.

(3) *Ibid.* s. 23.

(4) *Agricultural Cattle Insurance Company v. Fitzgerald*, 16 Q. B. 432.

(5) 7 & 8 Vict. c. 110, s. 55.

(6) *Pilbrow v. Pilbrow's Atmospheric Railway Company*, 3 C. B. 730 ; 4 D. & L. 450. See C. L. P. Act, 1852, s. 2, *ante*, pp. 85, 86.

on the “clerk, treasurer, or secretary of the company;”⁽¹⁾ but service on a clerk of the secretary is bad.⁽²⁾ The company must defend by attorney appointed under the corporate seal. The declaration need only describe them by their corporate title, without stating how they were incorporated.⁽³⁾

(c) *Execution against company and shareholders.*—“Every judgment and every decree or order, which shall be at any time after the passing of this act obtained against any company completely registered under this act, except companies incorporated by act of Parliament or charter, or companies, the liability of the members of which is restricted by virtue of any letters patent, in any action, suit, or other proceeding prosecuted by or against such company in any court of law or equity, shall and may take effect and be enforced, and execution thereon be issued, not only against the property and effects of such company, but also, if due diligence⁽⁴⁾ shall have been used to obtain satisfaction of such judgment, decree or order, by execution against the property and effects of such company, then against the person, property, and effects of any shareholder⁽⁵⁾ for the time being, or any former shareholder of such company in his

(1) C. L. P. Act, 1852, s. 16.

(2) *Walton v. Universal Salvage Company*, 16 M. & W. 438; 4 D. & L. 558.

(3) *Woolf v. City Steam Boat Company*, 7 C. B. 103; 6 D. & L. 606.

(4) Thus, if the company is being wound up, he must first prove his debt before the chief clerk, *Thompson v. Universal Salvage Company*, 3 Exch. 310; *Peart v. Universal Salvage Company*, 6 C. B. 478; *Mackenzie v. Sligo and Shannon Railway Company*, 4 E. & B. 119; *Hutchinson v. Harding*, 11 Exch. 561. As to what is due diligence, see *Thompson v. Universal Salvage Company*, 3 Exch. 310; *King v. Parental Endowment Company*, 11 Exch. 443.

(5) As to who is, see *Wilkinson v. Anglo-Californian Gold Company*, 21 L. J. 327, Q. B.; *Stewart v. Anglo-Californian Gold Company*, 21 L. J. 393, Q. B. The company may so contract with a third party, that no such execution against a shareholder may be competent: *Halkett v. Merchant Traders' Association*, 13 Q. B. 960. The return of the names of shareholders made under the act is *prima facie* evidence that a person is a shareholder, *Turner v. Metropolitan Live Stock Company*, 2 Exch. 567; *Corder v. Universal Gas Company*, 6 C. B. 554. The shareholder continues liable until the return of the transfer of any share shall have been made pursuant to the act: 7 & 8 Vict. c. 110, s. 13. This section enables a creditor who has got a judgment against a Joint Stock Company completely registered to enforce it by execution against shareholders, *Pritchard v. London and Birmingham &c. Railway Company*, 15 C. B. 331.

natural or individual capacity, until such judgment, decree or order, shall be fully satisfied: provided, in the case of execution against any former shareholder, that such former shareholder was a shareholder of such company at the time when the contract or engagement, for which such judgment, decree or order, may have been obtained, was entered into, or became a shareholder during the time such contract or engagement was unexecuted or unsatisfied, or was a shareholder at the time of the judgment, decree or order, being obtained: provided also, that in no case shall execution be issued on such judgment, decree or order, against the person, property or effects, of any such former shareholder of such company, after the expiration of three years next after the person sought to be charged shall have ceased to be a shareholder of such company.⁽¹⁾ Every person against whom, or against whose property or effects, execution upon any judgment, decree or order, obtained as aforesaid, shall have been issued as aforesaid, shall be entitled to recover against such company all loss, damages, costs and charges which such person may have incurred by reason of such execution; and that, after due diligence used to obtain satisfaction thereof against the property and effects of such company, such person shall be entitled to contribution for so much of such loss, damages, costs and charges as shall remain unsatisfied from the several other persons against whom execution upon such judgment, decree or order, obtained against such company, might also have been issued under the provisions in that behalf aforesaid, and that such contribution may be recovered from such person as aforesaid, in like manner as contribution in ordinary cases of co-partnership."⁽²⁾

Without sci. fa..]—"In the cases provided by this act for execution on any judgment, decree or order, in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder, or former shareholder of such company, or against the property and effects of the company, at the suit of any shareholder, or former shareholder, in satisfaction of any moneys, damages, costs, and expenses paid or incurred by him as aforesaid in any

(1) The remedy under this section is by *sci. fa.*; and any want of due diligence in proceeding against the company may be pleaded to the *sci. fa.*, *Marson v. Lund*, 16 Q. B. 345.

(2) 7 & 8 Vict. c. 110, ss. 66, 67; see *Peart v. Universal Salvage Company*, 18 L. J., 23 C. P.; 6 C. B. 478.

action or suit against the company, such execution may be issued by *leave of the court*, or of a *judge* of the court in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to show cause, or other motion or summons consistent with the practice of the court, without any suggestion or *scire facias* in that behalf; and that it shall be lawful for such court or judge to make absolute or discharge such rule, or allow or dismiss such motion (as the case may be), and to direct the costs of the application to be paid by either party, or to make such other order therein as to such court or judge shall seem fit; and in such cases such form of writs of execution⁽¹⁾ shall be sued out of the courts of law and equity respectively, for giving effect to the provision in that behalf aforesaid, as the judges of such courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in like manner as writs of execution are now enforced: provided that any order made by a judge as aforesaid may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order: provided also, that no such motion shall be made, nor summons granted, for the purpose of charging any shareholder, or former shareholder, until *ten days' notice* thereof shall have been given to the person sought to be charged thereby."⁽²⁾ The summary remedy given by this 68th section is cumulative to that given by the 66th.⁽³⁾ It is available to other creditors as well as shareholders suing the company.⁽⁴⁾ The notice need not be personally served;⁽⁵⁾ and a second application at chambers on the same notice cannot be made,⁽⁶⁾ but a fresh notice may be given.⁽⁷⁾ The notice must state, whether the application is to be made to the court, or a judge at chambers.⁽⁸⁾

(1) See a form of a *ca. sa.* against a shareholder in *Corder v. Universal Gas Company*, 6 C. B. 567.

(2) 7 & 8 Vict. c. 110, s. 68.

(3) *Marson v. Lund*, 16 Q. B. 345. See a proviso in a policy of insurance, which prevented the plaintiff issuing this execution: *Hassell v. Merchant Traders' Association*, 4 Exch. 525.

(4) *Thompson v. Universal Salvage Company*, 3 Exch. 310; *Pearl v. Universal Salvage Company*, 6 C. B. 478.

(5) *Turner v. Metropolitan Live Stock Company*, 17 L. J., 264 Exch.

(6) *Corder v. Universal Gas Company*, 6 C. B. 190.

(7) *Edwards v. Cameron's Railway Company*, 15 Jur., 470 Exch.; *Corder v. Universal Salvage Company*, 6 C. B. 554.

(8) *Corder v. Universal Gas Company*, 6 C. B. 190 and 554.

Form of Notice.[*Title of court and cause.*]

Whereas, a judgment was obtained on the _____, in Her Majesty's Court of _____, for the sum of £ _____, in a certain action brought by the above-named plaintiff against the above-named defendants, being a company completely registered under the statute passed in the seventh and eighth years of the reign of Her present Majesty, intituled an Act &c. : and, whereas the said plaintiff hath used due diligence to obtain satisfaction of the said judgment against the property and effects of the said company, but there is not any property, nor are there any effects of the said company out of which the said judgment or any part thereof can be satisfied. And, whereas, you C. D., [are a shareholder for the time being of the company, or as the case may be.] Now we do hereby give you notice, that upon the expiration of ten days from the date of the service of this notice upon you, or as soon after the expiration thereof as conveniently may be, a motion will be made in Her Majesty's court of _____, [or an application will be made to one of the judges, (or barons,) of] for a rule [or summons,] calling upon you to show cause why execution should not issue against you upon the said judgment, until the same shall be satisfied, pursuant to the provisions of the said statute.

P. A. & B., attorneys for the above-named plaintiff.

On making the application to a judge or the court, an *affidavit* must be produced, stating the signing of judgment, the amount due thereupon, the execution issued against the company, and the efforts made to obtain satisfaction from them, that the shareholder in question is a shareholder of the said company, verifying an extract from the official return of that fact, and that notice was duly served upon him.

Form of Affidavit.[*Title of court and cause.*]

1. That this action was commenced by writ of summons, sued out by me, as the attorney of the above-named plaintiff, on, &c., and the defendants, at the time of the accruing of the causes of the action for which the action was brought, were, and still are, a company completely registered under the statute, &c., and that the said company never has been incorporated by Act of Parliament or charter, and the liability of its members has not been restricted by virtue of any letters patent to the best of my knowledge and belief.

2. That a verdict was obtained, &c., [state signing of judgment and efforts made to levy execution, and, if necessary, add affidavit by the sheriff's officer.]

3. That the said judgment still remains wholly unsatisfied, and, from inquiries which I have made from various persons connected with the said company, in particular from [state result of inquiries,] I verily

believe that the said company, at the time of the recovery of the said judgment, had not, and that they have never since had, any goods, chattels, moneys, property, or effects whatever, and that any writ of execution against the property or effects of the said company would be wholly unavailing.

4. That I verily believe all due diligence has been used to obtain satisfaction of the said judgment by execution against the property or effects of the said company, and that the only mode of obtaining such satisfaction is by proceeding against the individual shareholder of the said company.

5. That I obtained from the office of the registrar of joint stock companies the document hereunto annexed, marked A., being a certified extract from the return filed under the said statute, 7 & 8 Vict. c. 110, by the directors of the said company, on the , and that the name of E. F. is inserted in the said return as having executed on the deed of settlement of the said company, as a shareholder holding shares thereof.

6. That no transfer of the said E. F.'s said shares has been registered with the said register, and I verily believe he is now a shareholder in the said company.

7. That I did on serve the said E. F. [personally] with a true copy of the notice hereunto annexed, marked B.

3. *Companies Clauses Consolidation Act, 1845,* 8 & 9 Vict. c. 16.

The 8 & 9 Vict. c. 16 consolidated the provisions usually inserted in acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature. Contracts may be entered into on the part of the company by directors,⁽¹⁾ who are not personally liable.⁽²⁾

(a) *Plaintiffs*].—The company sue in the manner stated *ante*, p. 735. If they have their works abroad, they must find security for costs.⁽³⁾

Actions for calls.].—Calls are payable by the statute 8 & 9 Vict. c. 16, ss. 21, 22, and not by contract;⁽⁴⁾ and interest accrues up to payment.⁽⁵⁾ The company may sue the shareholder for the call, together with interest.⁽⁶⁾ “In any

(1) 8 & 9 Vict. c. 16, ss. 97, 197; *Pauling v. London and North Western Railway Company*, 8 Exch. 867; *Lowe v. London and North Western Railway Company*, 21 L. J., 361 Q. B.

(2) 8 & 9 Vict. c. 16, s. 100.

(3) *Kilkenny Railway Company v. Fielden*, 6 Exch. 81.

(4) *Birkenhead &c. Railway Company v. Pilcher*, 5 Exch. 121; *Cork and Bandon Railway Company v. Goode*, 13 C. B. 826.

(5) 8 & 9 Vict. c. 16, s. 23.

(6) *Ibid.* s. 25.

action or suit to be brought by the company against any shareholder to recover any money due *for any call*, it shall not be necessary to set forth the special matter, but it shall be sufficient for the company to declare⁽¹⁾ that the defendant is the holder of one share or more in the company (stating the number of shares), and is indebted to the company in the sum of money to which the calls in arrear shall amount, in respect of one call or more, upon one share or more (stating the number and amount of each of such calls) whereby an action hath accrued to the company, by virtue of this and the special act."⁽²⁾ An Irish railway company cannot declare in an English court in this form.⁽³⁾ The shareholders liable to be sued are those who are on the register.⁽⁴⁾ No separate count need be added for interest, it being recoverable as damages;⁽⁵⁾ nor, on judgment by default, under a reference to the Master.⁽⁶⁾

Plea.—The defendant may traverse the fact of his being a shareholder,⁽⁷⁾ or the fact of notice being given of the calls, a plea of no notice being a traverse.⁽⁸⁾ The general issue of never indebted puts in issue the fact of the defendant

(1) See declarations held good in *Belfast and County Down Railway Company v. Strange*, 1 Exch. 739; *Birkenhead &c. Railway Company v. Watson*, 3 Exch. 478; 6 Exch. 627; *Midland Great Western Railway Company v. Evans*, 4 Exch. 649. See a plea of bankruptcy, *South Staffordshire Railway Company v. Burnside*, 5 Exch. 129; of infancy, *London and North Western Railway Company v. McMichael*, 5 Exch. 114; *Birkenhead &c. Railway Company v. Pilcher*, *ibid.* 121; *Dublin &c. Railway Company v. Black*, 8 Exch. 181; *Cork and Bandon Railway Company v. Cazenove*, 10 Q. B. 935.; an action against an allottee, *Waterford &c. Railway Company v. Pidcock*, 8 Exch. 279; what pleas may be pleaded, *Shropshire Railway Company v. Anderson*, 3 Exch. 401; where the action was against an executor for calls due in testator's lifetime, *Birkenhead &c. Railway Company v. Cotesworth*, 5 Exch. 226.

(2) 8 & 9 Vict. c. 16, s. 26.

(3) *Dundalk Western Railway Company v. Tapster*, 1 Q. B. 667.

(4) *Shropshire Railway Company v. Anderson*, 3 Exch. 401; *West London Railway Company v. Bernard*, 1 Dav. & M. 397; *Newry and Enniskillen Railway Company v. Edmunds*, 2 Exch. 118; *Sayles v. Blayne*, 14 Q. B. 205.

(5) *London and Brighton Railway Company v. Fairclough*, 2 M. & Gr. 674; 3 Sc. N. R. 68.

(6) C. L. P. Act, 1852, s. 94.

(7) *Shropshire Union Railway Company v. Anderson*, 3 Exch. 401.

(8) *Edinburgh &c. Railway Company v. Hebblethwaite*, 6 M. & W. 707.

being a shareholder, and all matters of fact tending to the conclusion that he is indebted.⁽¹⁾ A plea of set-off seems incompetent.⁽²⁾

Trial.]—"On the trial or hearing of such action or suit, it shall be *sufficient to prove* that the defendant, at the time of making such call, was a holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given as is directed by this or the special act and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and thereupon the company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear, either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within the period. The production of the register⁽³⁾ shall be *prima facie* evidence of such defendant being a shareholder, and of the number and amount of his shares."⁽⁴⁾

(b) *Defendants.*]—The company, when sued for dividends, are not entitled to relief under the Interpleader Act, 1 & 2 Vict. c. 58, s. 1.⁽⁵⁾

Notice of action.]—In some cases there must be notice of action under the statute, where the action is brought against

(1) *Birkenhead &c. Railway Company v. Brownrigg*, 4 Exch. 426; see where several pleas were allowed to be pleaded with never indebted, *Waterford &c. Railway Company v. Logan*, 14 Q. B. 672; and where several were disallowed, *South Eastern Railway Company v. Hebblethwaite*, 12 A. & E. 497.

(2) *Moore v. Metropolitan Sewage Manure Company*, 3 Exch. 333.

(3) i.e., the sealed register, *Birkenhead &c. Railway Company v. Brownrigg*, 4 Exch. 426.

(4) 8 & 9 Vict. c. 16, ss. 27, 28; see as to the register being evidence of the shareholders, *Waterford &c. Railway Company v. Pidcock*, 8 Exch. 279; as to proving the register, *London and North Western Railway Company v. McMichael*, 5 Exch. 855; as to keeping the register, *Bain v. Whitehaven &c. Railway Company*, 3 H. L. C. 1; *Inglis v. Great Northern Railway Company*, 1 Macq. Ap. C. 112; as to defects in the register, *London and Grand Junction Railway Company v. Freemam*, 2 Sc. N. R. 705; *Southampton Dock Company v. Richards*, 1 Sc. N. R. 219.

(5) *Dalton v. Midland Railway Company*, 12 C. B. 458.

the company or any person for anything done, or omitted to be done, in pursuance of the statute.⁽¹⁾ Thus, in an action to recover excessive charges for the carriage of goods, notice of action was held necessary⁽²⁾; but it was held unnecessary in actions for injury to a passenger in travelling.⁽³⁾ or to a horse.⁽⁴⁾ Where the notice was very voluminous, the court allowed the costs thereof, though fifty times the amount of the claim.⁽⁵⁾

Serving writ of summons on company.]—“Any summons or notice, or any writ or other proceeding at law, or in equity, requiring to be served upon the company, may be served by the same being left at, or transmitted through, the post, directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or, in case there be no secretary, then by being given to any one director of the company.”⁽⁶⁾ In ejectment against the company, personal service on the secretary is good.⁽⁷⁾

Company tendering amends.]—“If any party shall have committed any irregularity, trespass, or other wrongful proceeding in the execution of this or the special act, or by virtue of any power or authority thereby given, and, if before action brought in respect thereof, such party make tender of sufficient amends to the party injured, such last-mentioned party shall not recover in any such action; and, if no such tender shall have been made, it shall be lawful for the defendant, by leave of the court where such action shall be pending, at any time before issue joined, to pay into court such sum of money as he shall think fit; and thereupon such proceedings shall be had as in other cases where defendants are allowed to pay money into court.”⁽⁸⁾

(c) *Execution against shareholders.*]—“If any execution, either in law or in equity, shall have been issued against the

⁽¹⁾ *Boyd v. London and Croydon Railway Company*, 6 Sc. 461.

⁽²⁾ *Kent v. Great Western Railway Company*, 3 C. B. 714.

⁽³⁾ *Carpue v. London and Brighton Railway Company*, 5 Q. B. 747.

⁽⁴⁾ *Palmer v. Grand Junction Railway Company*, 4 M. & W. 749.

⁽⁵⁾ *Kent v. Great Western Railway Company*, 3 C. B. 714.

⁽⁶⁾ 8 & 9 Vict. c. 16, s. 135; see an instance of bad service, *Pilbrow v. Pilbrow's Atmospheric Railway Company*, 3 C. B. 730.

⁽⁷⁾ *Doe d. Bayes v. Roe*, 16 M. & W. 98.

⁽⁸⁾ 8 & 9 Vict. c. 16, s. 141.

property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders,⁽¹⁾ to the extent of their shares respectively in the capital of the company, not then paid up; provided always that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice⁽²⁾ in writing to the person sought to be charged, and upon such motion such court may order execution to issue accordingly, and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution at all reasonable times to inspect the register of shareholders without fee."⁽³⁾ The court exercises a discretion as to allowing a *sci. fa.* against a shareholder, and must be satisfied not only that the company have no funds, but that the plaintiff has used diligence to discover them; whether he has used due diligence is a preliminary matter decided by the court on giving leave to issue execution; when the *sci. fa.* issues, such due diligence is stated in the writ, and may be traversed.⁽⁴⁾ A suggestion is not necessary.⁽⁵⁾ Where an *elegit* had been sued out against the company, which was insufficient to satisfy the debt, there being nothing but a small future rent to receive when it accrued, it was held the plaintiff, who had never taken actual possession of the lands under the *elegit*, might sue out a *scire facias* against a shareholder for the whole amount.⁽⁶⁾ So

(¹) A shareholder is a person who has subscribed to the capital, or is entitled to a share, and whose name is on the register (8 & 9 Vict. c. 16, s. 8), or who has contracted to subscribe (*Newry and Enniskillen Railway Company v. Coombe*, 3 Exch. 565), and who is a shareholder at the time of the sheriff's return of *nulla bona*: *Nixon v. Green*, 11 Exch. 550. A purchaser of scrip may be registered: *London Grand Junction Railway Company v. Freeman*, 2 Sc. N. R. 705. As to how the register is to be kept, and the entries made, see 8 & 9 Vict. c. 16, ss. 9, 28; *Bain v. Whitehaven and Furness Railway Company*, 3 H. L. C. 1; *Southampton Dock Company v. Richards*, 1 Sc. N. R. 219; *Ex parte Nash*, 15 Q. B. 22; *Inglis v. Great Northern Railway Company*, 1 Macq. Ap. C. 112.

(²) It seems this notice need not be personally served, *Turner v. Metropolitan Live Stock Company*, 2 Exch. 567; 6 D. & L. 59.

(³) 8 & 9 Vict. c. 16, s. 36.

(⁴) *Devereux v. Kilkenny &c. Railway Company*, 5 Exch. 834.

(⁵) *Ibid.*; *Hitching v. Kilkenny Railway Company*, 10 C. B. 166.

(⁶) *Addison v. Tate*, 11 Exch. 250; *R. v. Derbyshire &c. Railway Company*, 3 E. & B. 784.

where the company was in process of being wound up, and a sum of money belonging to the company was in the hands of the official manager, but not available for the satisfaction of the judgment, the court allowed a *sci. fa.* against a shareholder.⁽¹⁾

How.]—The only mode of obtaining execution against a shareholder is by motion for a *sci. fa.*, and not for a rule for execution against a shareholder.⁽²⁾ After issuing execution against the property of the company, and using all reasonable efforts to levy, the notice mentioned *ante*, p. 747, must be served on the shareholder. An affidavit must be made of the facts, for which purpose the register may be inspected under the 36th section,⁽³⁾ and counsel may then be instructed to move for a rule *nisi*.

The affidavit must state that the shareholder's name is on register,⁽⁴⁾ or show in some other way that he is a shareholder,⁽⁵⁾ what number of shares he has, what is the amount of the judgment, how much is due thereon, that due diligence has been used in issuing execution against the company,⁽⁶⁾ for which purpose the shareholder's admission that the company had no funds may be used; ⁽⁷⁾ but a return of *nulla bona* to a *fi. fa.* is not sufficient evidence that there are no funds.⁽⁸⁾ The affidavit must also state service of the notice; and it seems, if the notice was insufficient, a fresh notice may be given and a new application made.⁽⁹⁾

Scire facias.]—The *scire facias* should state that execution has issued against the company, and been insufficient, and that the party is a shareholder, and is possessed of shares, which latter averments are traversable.⁽¹⁰⁾ The defendant cannot plead to the *sci. fa.* that due efforts have not been used

(1) *Mackenzie v. Sligo &c. Railway Company*, 4 E. & B. 119.

(2) *Hichins v. Kilkenny &c. Railway Company*, 10 C. B. 160; 1 L. M. & P. 712.

(3) *Ante*, p. 747.

(4) *Turner v. Metropolitan Live Stock Company*, 2 Exch. 567; 6 D. & L. 59.

(5) *Rastrick v. Derbyshire &c. Railway Company*, 23 L. J. 2, Exch.; 9 Exch. 149.

(6) *Thompson v. Universal Salvage Company*, 3 Exch. 310; *Hichins v. Kilkenny &c. Railway Company*, 1 L. M. & P. 712.

(7) *Devereux v. Kilkenny &c. Railway Company*, 5 Exch. 834.

(8) *Hichins v. Kilkenny &c. Railway Company*, 1 L. M. & P. 712; 15 C. B. 459.

(9) *Corder v. Universal Light Company*, 6 C. B. 554.

(10) *Devereux v. Kilkenny &c. Railway Company*, 5 Exch. 834.

against the company,⁽¹⁾ or that no leave to issue the *sci. fa.* was given.⁽²⁾

Form of Scire Facias.

— Whereas, A. B., on _____, in our Court of _____, by the judgment of the court, recovered against the _____ company £ _____, whereof the said company are convicted. And now the said A. B. gives us to understand and be informed that the said company were and are incorporated under the name of the _____ Company, under and by virtue of a statute passed &c. _____ . And now, on behalf of the said A. B., we are further informed that on _____ execution was duly issued out of our said Court of _____, on the said judgment against the property and effects of the said company, but that there could not be found sufficient [or any] property or effects whereon to levy such execution, or any part thereof, although a reasonable time for that purpose has long since elapsed. And that you, the said E. F., now are the holder of and entitled to _____ shares in the capital of the said company, and that your name has been and is duly entered in the register of shareholders, kept by the said company, under the statute in that behalf, as the person entitled to the said shares in the said company and each of them, and that there still remains unpaid, in respect of each of your said shares, towards the capital of the said company, to wit, £ _____. And that, although judgment be thereupon given, yet execution of the damages aforesaid still remains to be made to the said A. B. Wherefore the said A. B. hath humbly besought us to provide him a proper remedy in this behalf, and our said court having, to wit, on the _____ ordered, under the statute in that behalf, that the said A. B. should be at liberty to issue a writ of *scire facias* for the purpose of having execution against you, the said E. F., upon the said judgment, to the extent of the said moneys remaining to be paid on or in respect of your said shares in the said company, towards the capital thereof, and we being willing that what is just and right in this behalf should be done, command you that within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our said Court of _____, to show cause if you have, or know of anything to say for yourself, why the said A. B. ought not to have execution against you, the said C. D., for the said £ _____, according to the force and effect of the said recovery, and of the statute in such case made and provided, to the extent of the moneys now remaining to be paid on, and in respect of your said shares, in the said company, towards the capital of the said company. And take notice, that in default of your so doing, the said A. B. may proceed to execution. Witness, &c.

4. *Banking and other Companies suing and being sued by Public Officers.*

(a) *Joint Stock Banks under 7 & 8 Vict. c. 113.*—The statute 7 & 8 Vict. c. 113, provided that after the 5th Sept.,

⁽¹⁾ *Devereux v. Kilkenny Railway Company*, 5 Exch. 834.

⁽²⁾ *Marson v. Lund*, 16 Q. B. 345.

1844, not more than six persons could enter into a banking partnership and carry on the same, unless they obtained letters patent (s. 1), and that such companies might be incorporated by letters patent from the Crown: (s. 6.) The shareholders were, however, to continue liable for the dealings of the company, subject to the provisions following: (s. 7.) "No action or suit by or against the company shall be in anywise affected by reason of the plaintiff or defendant therein being a shareholder or former shareholder of the company; but any such shareholder, either alone or jointly with another person, as against the company, or the company as against any such shareholder, either alone or jointly with any other person, shall have the same action and remedy in respect of any cause of action or suit whatever, which such shareholder or company might have had, if such cause of action or suit had arisen with a stranger:" (s. 8.)

Actions against the company.—“In all cases wherein it may be necessary for any person to serve any notice, writ, or other proceeding at law, or in equity or otherwise, upon the company, service thereof respectively on the manager or any director for the time being of the company, by leaving the same at the principal office of the company, or, if the company have suspended or discontinued business, by serving the same personally on such manager or director, or by leaving the same with some inmate at the usual or last abode of such manager or director, shall be deemed good service of the same upon the company:” (s. 43.) “Every judgment, decree, or order of any court of justice, in any proceeding against the company, may be lawfully executed against and shall have the like effect on the property and effects of the company, and also subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder, and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding:” (s. 9.)

Execution against.—“It shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against the company, to be issued against the property and effects of the company, and if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby, then it shall be lawful for him to have execution in satisfaction of such judgment, decree, or order against the person, property, and effects of any shareholder, or in default of

obtaining satisfaction of such judgment, decree, or order from any shareholder, against the person, property, and effects of any person who was a shareholder at the time when the cause of action against the company arose; but no person who has ceased to be a shareholder is liable, if such judgment has been obtained after the expiration of three years from his ceasing to be such:" (s. 13.)

"In the cases provided by this act for *execution* on any judgment, decree, or order, in any action or suit against the company, to be issued *against* the person, or against the property and effects of any *shareholder* or former shareholder of such company, or against the property and effects of the company, at the suit of any shareholder or former shareholder, in satisfaction of any moneys, damages, costs, and expenses paid or incurred by him as aforesaid, in any action or suit against the company, such *execution* may be issued *by leave* of the court, or of a judge of the court in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to show cause, or other motion or summons consistent with the practice of the court, without any suggestion or *scire facias* in that behalf; and that it shall be lawful for such court or judge to make absolute or discharge such rule, or allow or dismiss such motion (as the case may be), and to direct the costs of the application to be paid by either party, or to make such order therein as to such court or judge shall seem fit; and in such cases such form of writs of execution⁽¹⁾ shall be sued out of the courts of law and equity respectively, for giving effect to the provision in that behalf aforesaid, as the judges of such courts respectively shall from time to time think fit to order, and the execution of such writs shall be enforced in like manner as writs of execution are now enforced, provided that any order made by a judge as aforesaid may be discharged or varied by the court, on application made thereto by either party dissatisfied with such order, provided also that no such motion shall be made nor summons granted for the purpose of charging any shareholder or former shareholder, until *ten days' notice* thereof shall have been given to the person sought to be charged thereby:" (s. 13.) A shareholder, against whom execution has issued, is entitled to be reimbursed out of the property of the company, or, in default thereof, by contribution from the other shareholders: (s. 11.) He may, within fourteen days,

⁽¹⁾ See mode of issuing execution under 7 & 8 Vict. c. 110, *ante*, p. 739, *et seq.*

demand such reimbursement, and if not reimbursed, may issue execution against the company, and one of the Masters will certify the amount of his damages and expenses: (s. 12.) If the shareholder cannot by these means recover the expenses he has been put to, he may divide the amount he claims among the shareholders, and may sue each for contribution: (s. 14.)

(b) *Proceedings in actions against companies under 7 Geo. 4, c. 46.*—A banking company within 7 Geo. 4, c. 46,⁽¹⁾ must sue and be sued in the name of their public officer. It is usual to describe in the writ of summons the character in which the defendant is sued. In the declaration it should be stated, that the defendant was the public officer at the time of the action brought.⁽²⁾ If the officer die, or be changed, there should be a suggestion of the fact, for which purpose the leave of the court must be obtained;⁽³⁾ and the suggestion may, it seems, be traversed.⁽⁴⁾ The court will amend a judgment entered up in the name of a public officer since changed.⁽⁵⁾ The bankruptcy of the public officer does not affect the liability of the company.⁽⁶⁾ If a mistake is made in the public officer the judgment binds the company till it is set aside,⁽⁷⁾ unless the judgment was obtained by collusion, in which case a motion may be made to set it aside.⁽⁸⁾

Execution against company and shareholder.—A judgment against the public officer is a judgment against the company.⁽⁹⁾ And “execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or copartnership, carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that in case any such execution against any member or members for the time being of any

(1) *Chapman v. Milvain*, 5 Exch. 61.

(2) *Esdaile v. Maclean*, 15 M. & W. 277; *McIntyre v. Miller*, 13 M. & W. 725; 2 D. & L. 708.

(3) *Barnewall v. Sutherland*, 9 C. B. 381.

(4) *Ibid.*; *Webb v. Taylor*, 1 D. & L. 676; *Todd v. Wright*, 16 L. J. 111, Q. B.

(5) *Ibid.*

(6) 7 Geo. 4, c. 46, s. 12. See where the deed of the company provided for this, *Steward v. Dunn*, 12 M. & W. 655; 1 D. & L. 642.

(7) *Bradley v. Eyre*, 1 D. & L. 260.

(8) *Ibid.*; *Phillipson v. Earl of Egremont*, 6 Q. B. 587; *Fowler v. Rickerby*, 2 M. & Gr. 760.

(9) 7 Geo. 4, c. 46, s. 12; and a shareholder may sue the company: 5 & 6 Vict. c. 85.

such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties, so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts, or engagement or engagements, in which such judgment may have been obtained, was or were entered into,⁽¹⁾ or became a member at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided always, that no such execution as last-mentioned shall be issued without *leave* first granted *on motion* in open court by the court in which such judgment shall have been obtained, and when motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership."⁽²⁾ The public officer or shareholder, against whom execution has issued, is entitled to be reimbursed out of the funds of the company, or, in failure thereof, by contribution from the other shareholders.⁽³⁾ In order to reach a shareholder, a *scire facias*, and not a suggestion, is necessary;⁽⁴⁾ which may issue against a member for the time being without leave of the court;⁽⁵⁾ and the writs may issue concurrently;⁽⁶⁾ but in the case of the public officer, no *sci. fa.* is necessary.⁽⁷⁾ In

⁽¹⁾ See as to proceeding against members at the time of the contract, *Bank of England v. Johnson*, 3 Exch. 598; *Harvey v. Scott*, 11 Q. B. 92; *Field v. Mackenzie*, 4 C. B. 705.

⁽²⁾ 7 Geo. 4, c. 46, s. 13.

⁽³⁾ *Ibid.* s. 14.

⁽⁴⁾ *Clowes v. Brettell*, 10 M. & W. 506; 2 Dowl. N. S. 528; *Wingfield v. Barton*, 2 Dowl. N. S. 355; *Ransford v. Bosanquet*, 2 Q. B. 972.

⁽⁵⁾ *Bank of Scotland v. Fenwick*, 1 Exch. 792; *Harrison v. Tyson*, 1 B. C. C. 111; *Ricketts v. Bowhay*, 3 C. B. 889.

⁽⁶⁾ *Nunn v. Lomer*, 3 Exch. 471; *Burmester v. Cropton*, 3 Exch. 297.

⁽⁷⁾ *Harwood v. Law*, 7 M. & W. 203; 8 Dowl. 899. See where a shareholder pleaded he was not made a member through his wife, *Dodgson v. Bell*, 5 Exch. 967; *Ness v. Angas*, 3 Exch. 805. So as to an executor of a shareholder, *Ness v. Armstrong*, 4 Exch. 21; *Ness v. Bertram*, *ibid.* 195. So as to a director, *Scott v. Berkeley*, 3 C. B. 925. See as to the effect of directors not complying with forms of deed as to a transfer, *Bosanquet v. Shortbridge*, 4 Exch. 699; 5 H. L. Cas. As to stamp office returns being evidence of a proprietorship, *Prescott v. Buffery*, 1 C. B. 41.

order to reach a *former* shareholder, the application must show he has made *bonâ fide* and substantial endeavours to render execution available against members for the time being, though, it seems, it need not be shown that execution should first be issued against all the members for the time being.⁽¹⁾

Rule nisi for sci. fa.]—A motion is made in open court⁽²⁾ for a rule nisi only, and the court will not allow the time for showing cause to be shortened because of the limitation of the period by the statute.⁽³⁾ A second application on fresh affidavits may sometimes be allowed.⁽⁴⁾ So, where the rule has dropped inadvertently.⁽⁵⁾

Showing cause against.]—It cannot be shown as cause against the rule, that a solvent party had been allowed collusively to transfer his shares and get rid of liability, or that a shareholder not proceeded against is indemnified, or that the one proceeded against is not liable, on all the causes of action in respect of which the judgment was entered up.⁽⁶⁾ If there is a doubt whether the party is a shareholder, the court will leave that to be tried under the *sci. fa.*⁽⁷⁾ So, whether the judgment was fraudulently obtained.⁽⁸⁾

Scire facias granted.]—The writ of *sci. fa.*⁽⁹⁾ is tested, directed, and proceeded upon like a writ of revivor.⁽¹⁰⁾ If it is issued without leave, where leave is necessary, it may be quashed on prompt application.⁽¹¹⁾ So it may be quashed, if it allege that the defendant was a "member for the time

(1) *Field v. Mackenzie*, 4 C. B. 705; *Harvey v. Scott*, 11 Q. B. 92; *Bank of England v. Johnson*, 3 Exch. 598.

(2) 7 Geo. 4, c. 46, s. 13; *Wingfield v. Barton*, 2 Dowl. N. S. 355.

(3) *Field v. Mc Kenzie*, 5 D. & L. 172; 4 C. B. 705.

(4) *Dodgson v. Scott*, 2 Exch. 457.

(5) *Field v. Mc Kenzie*, 6 C. B. 384. See the substance of an affidavit on this application in *Hervey v. Scott*, 11 Q. B. 93.

(6) *Harvey v. Scott*, 11 Q. B. 92.

(7) *Bank of England v. Johnson*, 3 Exch. 598; *Clowes v. Brettell*, 11 M. & W. 461; 2 Dowl. N. S. 1020.

(8) *Dodgson v. Scott*, 2 Exch. 457; 6 D. & L. 27.

(9) See forms of *scire facias*; *Ricketts v. Bowhay*, 3 C. B. 889; *Fowler v. Rickerby*, 2 M. & Gr. 760; *Ness v. Fenwick*, 2 Exch. 598; *Nunn v. Lomer*, 3 Exch. 471.

(10) C. L. P. Act, 1852, s. 132. See post, "Sci. Fa."

(11) *Bank of Scotland v. Fenwick*, 1 Exch. 792; 5 D. & L. 377; *Ricketts v. Bowhay*, 3 C. B. 889.

being," that phrase being ambiguous.⁽¹⁾ But it will not be quashed, merely because the plaintiff has a collateral security from the company not made available.⁽²⁾ The affidavits, on an application to set aside the judgment, and the *sci. fa.*, may be intitled in both rules.⁽³⁾

Declaration in sci. fa.—The declaration⁽⁴⁾ in *sci. fa.* should allege, that the debt on the judgment is due to the plaintiff,⁽⁵⁾ but need not allege, that the company were actually carrying on business when the action was brought.⁽⁶⁾ A declaration has been held sufficient, which alleged that the defendant was "now a member of the said copartnership."⁽⁷⁾

Plea.—It is not a fit subject of a plea, that the *sci. fa.* issued without leave of the court;⁽⁸⁾ nor of a demurrer, that the declaration varies from the writ in the number of defendants, as this may be taken advantage of on motion, and nonjoinder of other shareholders cannot be pleaded in abatement.⁽⁹⁾ But the defendant may plead fraud in the judgment.⁽¹⁰⁾ It is no answer to a *sci. fa.* against a member for the time being, that the plaintiff had previously issued another *sci. fa.* against another member for the time being of the same copartnership.⁽¹¹⁾

(c) *Suing and being sued generally through public officer.*—The statute 7 Geo. 4, c. 46, s. 9, enables copartnerships of bankers to commence or institute, and prosecute, all actions and suits, and all other proceedings at law or in equity, in the name of any one of the public officers nominated as aforesaid for the time being of such copartnership; in like manner, he may be the nominal defendant on behalf of the

(1) *Ibid.*; see, as to amendment, *Esdaile v. Trustwell*, 1 Exch. 371; 5 D. & L. 219.

(2) *Field v. Mackenzie*, 4 C. B. 705; 5 D. & L. 348.

(3) *Bosanquet v. Woodford*, 5 Q. B. 310; 5 Jur. 831.

(4) See a form of declaration in *sci. fa.*, *Nunn v. Claxton*, 3 Exch. 712.

(5) *Ness v. Fenwick*, 2 Exch. 598.

(6) *Ness v. Bertram*, 4 Exch. 195.

(7) *Nunn v. Claxton*, 3 Exch. 712; 6 D. & L. 637.

(8) *Bradley v. Warburg*, 11 M. & W. 452; *Marson v. Lund*, 16 Q. B. 345.

(9) *Fowler v. Rickerby*, 2 M. & Gr. 760; 3 Sc. N. R. 138.

(10) *Dodgson v. Scott*, 2 Exch. 457; 6 D. & L. 27; *Phillipson v. Earl of Egremont*, 6 Q. B. 587.

(11) *Burmester v. Cropton*, 3 Exch. 397. See a plea in abatement that a concurrent writ of *sci. fa.* had issued against another, *Nunn v. Lomer*, 3 Exch. 471; *Esdaile v. Lund*, 12 M. & W. 607.

company; and his death, resignation, or removal shall not abate or prejudice the action, but it may be continued in the name of any other public officer for the time being. Any shareholder in a banking copartnership carrying on business under 7 Geo. 4, c. 46, and 6 Geo. 4, c. 32, may sue or be sued by the public officer as representing the company, as if they were respectively strangers.⁽¹⁾ So the banking companies, which are not within 7 & 8 Vict. c. 113, are authorized to sue and be sued in like manner.⁽²⁾ The company under 7 Geo. 4, c. 46, must sue and be sued by their public officer, and not in the name of those directors who made the contract,⁽³⁾ and may be compelled to appoint an officer for that purpose;⁽⁴⁾ and the delivery of a return to the stamp office under 7 Geo. 4, c. 67, s. 2, is not a condition precedent to their so suing.⁽⁵⁾ They may so sue on a guarantee given to them before their name was changed;⁽⁶⁾ or they may sue even after stopping payment.⁽⁷⁾

Various statutes authorize public bodies to sue and be sued by their public officer, and in such cases the members of these bodies are not personally liable, but the funds of the corporation only. The Friendly Societies Act (18 & 19 Vict. c. 63, s. 19) enables the trustee or trustees of the society to sue and be sued on behalf of the company, and no action is to abate by the death of such trustee. Where the clerk of a committee of visitors appointed under the Lunatic Asylums Act (15 & 16 Vict. c. 97) was sued by an archi-

(1) 1 & 2 Vict. c. 96, continued by 5 & 6 Vict. c. 85. Thus they may sue for the price of shares in their company, *Davidson v. Bower*, 5 Sc. N. R. 539.

(2) 7 & 8 Vict. c. 113, s. 47.

(3) *Chapman v. Milvain*, 5 Exch. 61; 1 L. M. & P. 209.

(4) *Davison v. Farmer*, 6 Exch. 242; *Steward v. Greaves*, 10 M. & W. 711; 2 Dowl. N. S. 485. See the case of a special statute which allowed the secretary to be nominal defendant, *Beech v. Eyre*, 5 M. & Gr. 415; 6 Sc. N. R. 327. See also *Blewitt v. Gordon*, 1 Dowl. N. S. 815.

(5) *Bonar v. Mitchell*, 5 Exch. 415. See also the case of a special statute requiring the names of the shareholders to be enrolled, *Wills v. Murray*, 4 Exch. 843.

(6) *Wilson v. Craven*, 8 M. & W. 584.

(7) *Davidson v. Cooper*, 11 M. & W. 778. See *Lyon v. Haynes*, 6 Sc. N. R. 371. See also cases where they were authorized by statute to sue through their secretary, *Smith v. Goldworthy*, 4 Q. B. 430; *Skinner v. Lambert*, 4 M. & Gr. 477; 5 Sc. N. R. 197; *Wills v. Sutherland*, 7 D. & L. 89; through their chairman, *Bank of Australasia v. Harding*, 9 C. B. 661. See where the poor-law guardians of a parish appointed under a statute sued through their treasurer, *Kingsford v. Dutton*, 1 L. M. & P. 479; where commissioners of navigation were rightly sued through their clerk, *Allen v. Hayward*, 7 Q. B. 960.

fect for supplying plans of a proposed asylum, it was held an action lay against the clerk, though the committee consisted of fluctuating members.⁽¹⁾ Where the trustees of a turnpike road were sued in the name of their clerk under 3 Geo. 4, c. 126, s. 74, the property of the clerk could not be taken in execution.⁽²⁾ The remedy against the company is by *mandamus* to pay the sum.⁽³⁾ But if the company have no assets, the court may refuse a *mandamus*.⁽⁴⁾

5. Companies under Letters Patent.

Companies may be established, and the liability of its members qualified, by letters patent from the Crown, granted under 7 Will. 4 & 1 Vict. c. 73. In such cases the company may sue and be sued by one of its public officers; and no action is to abate by the death, removal, or bankruptcy of such officer: (ss. 2, 22, 25.) When it may be necessary to serve any summons, demand, notice, or writ on the company, such service may be made on the clerk of the company or body, or by leaving the same at the head office, or at the place of abode of some agent or officer employed by the company: (s. 26.) All judgments against such officer have the same effect against the property and effects of the company as if all the members were parties thereto: "provided that, where the extent per share of the liability of the individual members shall have been limited by any letters patent as aforesaid, no such execution or diligence shall be issued against any such individual existing and former member of such company or body as aforesaid for a greater sum than the residue, if any, of the amount for which, by virtue of such letters patents as aforesaid, such individual member shall be liable in respect of the share or shares then or theretofore held by him in the said company or body, after deducting therefrom the amount, if any, which shall appear by such register as aforesaid to have been advanced and paid in respect of such shares, or any of them, by himself or herself, or any previous or subsequent holder of the same shares, or any of them, or the representatives of any such holder under or by virtue of any former execution

⁽¹⁾ *Kendall v. King*, 29th Jan. 1856, C. P.

⁽²⁾ *Wormwell v. Hailstone*, 6 Bing. 668; 4 M. & P. 512; *Case v. Chapman*, 5 A. & E. 661.

⁽³⁾ *Ibid.*; *R. v. Saint Katherine Dock Company*, 4 B. & Ad. 360; *Corpe v. Glyn*, 3 B. & Ad. 801.

⁽⁴⁾ *R. v. Victoria Park Company*, 1 Q. B. 288.

or diligence, and not repaid at the time of issuing such subsequent execution or diligence :” (s. 24.) The liability of the shareholder may be limited to the extent per share declared and limited in the letters patent (s. 4); and it is for the defendant to plead the extent of this liability.⁽¹⁾ A shareholder continues liable, till a return of his transfer shall be registered : (s. 21.)

6. *Limited Liability Companies.*

Certain companies, consisting of not less than twenty-five persons, may obtain certificates of complete registration and have their liability limited under 18 & 19 Vict. c. 133. The provisions of 7 & 8 Vict. c. 110, amended by 11 Vict. c. 78, extend to those companies. The company’s name must be used in all transactions, and a director of the company not using such name in bills of exchange, &c., is liable for the whole amount. The liability of each shareholder for any debt or engagement of the company is limited as follows : (s. 7.) “If any execution, sequestration, or other process in the nature of execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy or enforce such execution, sequestration, or other process, then such execution, sequestration, or other process may be issued against any of the shareholders to the extent of the portions of their shares respectively in the capital of the company not then paid up, but no shareholder shall be liable to pay in satisfaction of any one or more such execution, sequestration, or other process a greater sum than shall be equal to the portion of his shares not paid up : provided always that no such execution shall issue against any shareholder except upon an order of the court or of a judge of the court in which the action, suit, or other proceeding shall have been brought or instituted, and such court or judge may order execution to issue accordingly, with the reasonable costs of such application and execution, to be taxed by a master of the said court ; and for the purpose of ascertaining the names of the shareholders and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution at all reasonable times to inspect the register of shareholders without fee :” (s. 8.) If the directors declare a

⁽¹⁾ *Phillipson v. Earl of Egremont*, 6 Q. B. 587.

dividend, when they know the company is insolvent, they will be jointly and severally liable for the company's debts to the extent of such dividend ; but any director may exempt himself from liability by filing with the clerk his objection to the dividend in writing : (s. 9.) So they shall be liable for any loan of money to a shareholder : (s. 10.)

7. *Winding-up of Companies.*

The winding-up of companies is provided for by the acts 11 & 12 Vict. c. 45, 12 & 13 Vict. c. 108, 13 & 14 Vict. c. 38. On an order absolute for the dissolution, the assets become absolutely vested in the official manager, who may sue and be sued on behalf of the company ;⁽¹⁾ but actions may still be brought against one or more members of the company.⁽²⁾ An action, however, cannot be brought against the official manager of a company only provisionally registered,⁽³⁾ and hence the provisions of the winding-up acts do not apply to the case of an action against a non-registered company. Where the official manager has been appointed during the action, the fact may be suggested, and the name of that officer substituted,⁽⁴⁾ and his death, resignation, or removal shall not abate the action.⁽⁵⁾ He may compound doubtful claims.⁽⁶⁾ All judgments against the official manager have the effect of judgments against the company,⁽⁷⁾ and do not affect the person or property of the official manager, otherwise than as a contributory, and he is to be reimbursed all costs out of the assets.⁽⁸⁾ The official manager requires the leave of the Master to bring an action, but the want of such leave is not to be set up as a defence ;⁽⁹⁾ so leave is required to enable the official manager to defend an action on behalf of a contributory,⁽¹⁰⁾ or on behalf of the company ; and no creditor can bring such action until after proving his debt before the Master, "and it shall be lawful for any

⁽¹⁾ 11 & 12 Vict. c. 45, s. 50.

⁽²⁾ *Beardshaw v. Londesborough*, 2 L. M. & P. 560 ; 11 C. B. 498 ; *Russell v. Croysdill*, 11 Exch. 123,

⁽³⁾ *Prichard v. London and Birmingham &c., Railway Company*, 15 C. B. 331.

⁽⁴⁾ 11 & 12 Vict. c. 45, ss. 52, 53.

⁽⁵⁾ *Ibid.* s. 54.

⁽⁶⁾ *Ibid.* s. 55 ; 12 & 13 Vict. c. 108, s. 29.

⁽⁷⁾ 11 & 12 Vict. c. 45, s. 57.

⁽⁸⁾ *Ibid.* s. 59.

⁽⁹⁾ *Ibid.* s. 60.

⁽¹⁰⁾ *Ibid.* s. 62 ; *Beardshaw v. Lord Londesborough*, 11 C. B. 498.

judge of the court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed, until after such proof shall have been made or exhibited before the Master."⁽¹⁾ The dissolution of the company, by an order to wind up, is no bar to an action by creditor against the company; nor can the omission to prove his debt be pleaded in bar to such action; the proper remedy being to stay proceedings till after proof made.⁽²⁾ If a claimant has exhibited proof which the Master has considered unsatisfactory, such claimant cannot sue the official manager for the claim without giving better proof.⁽³⁾ The appointment of an interim manager does not prevent actions being thus brought.⁽⁴⁾ Where the action has been stayed, the plaintiff may prove his debt and then proceed.⁽⁵⁾ The court has refused to stay the action against a shareholder, who was sued severally on a joint and several note made with other shareholders.⁽⁶⁾ The action has been stayed after a *ca. sa.* issued.⁽⁷⁾ Where the official manager had money of the company, which was not available to satisfy a judgment against the company, the court allowed a *sci. fa.* against a shareholder under 8 & 9 Vict. c. 16, s. 36.⁽⁸⁾ The Master, now the chief clerk of the Vice-Chancellor, has power to direct an issue or question of fact to be tried by jury, or to require a contributory to interplead.⁽⁹⁾

(¹) 11 & 12 Vict. c. 45, s. 73. See *Thompson v. Universal Salvage Company*, 3 Exch. 310; *Marson v. Lund*, 13 Q. B. 664.

(²) *Mackenzie v. Sligo &c. Railway Company*, 21 L. J. 380, Q. B.

(³) *Macgregor v. Keily*, 4 Exch. 801.

(⁴) *Mackenzie v. Sligo &c. Railway Company*, 4 E. & B. 119.

(⁵) *Hutchinson v. Harding*, 11 Exch. 561.

(⁶) *Brettell v. Dawes*, 7 Exch. 307.

(⁷) *Prescott v. Hadow*, 5 Exch. 727.

(⁸) *Penkivale v. Connell*, 1 L. M. & P. 398.

(⁹) 12 & 13 Vict. c. 108, s. 31.

CHAPTER XV.

BAIL—ARREST OF ABSCONDING DEBTORS.

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| 1. In what cases held to bail. | when and how sworn. |
| 2. Affidavit to hold to bail. | 3. Judge's order. |
| (a) Title of affidavit, and name of defendant. | 4. Writ of <i>capias</i> . |
| (b) Quitting England. | (a) Form. |
| (c) Statement of cause of action. | (b) Requisites. |
| (d) Form of affidavit, and | 5. The arrest. |
| | (a) Who may be arrested. |
| | (b) How arrested. |

1. In what Cases.

IN some cases when the debtor, about to be sued or against whom an action has been commenced, is about to abscond and quit England, and thereby defeat the process of the court, it is in the power of the plaintiff to arrest the defendant, so as to detain his person, or obtain security against the action being fruitless. This holding to bail is a proceeding collateral to the action, which commences by writ of summons, and goes on in the usual way until judgment. An action lies against the plaintiff for maliciously, and without probable cause, holding the defendant to bail; and the declaration must show that the order for a *capias* was obtained by falsehood or fraud.⁽¹⁾

The act 1 & 2 Vict. c. 110, s. 3, restricted the power of arrest to the same actions in which before that act arrest was allowed, and arrest was then allowed, with few exceptions, in all actions, either upon the order of a judge

⁽¹⁾ *Daniels v. Fielding*, 16 M. & W. 200; *Ross v. Norman*, 1 L. M. & P. 409; *Gibbons v. Alison*, 3 C. B. 181. And if the plaintiff held the defendant to bail for too much, the defendant was entitled to costs by 43 Geo. 3, c. 46, s. 33; but that statute seems now inapplicable: (*Ricketts v. Noble*, 3 Exch. 521.)

or without such order. But now that section provides, that if a plaintiff in such action "shall, by the affidavit of himself or of some other person, show to the satisfaction of a judge of one of the superior courts, that such plaintiff has a cause of action against the defendant or defendants to the amount of 20*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit England unless he or they be forthwith apprehended, it shall be lawful for such judge by a special order to direct that such defendant or defendants, so about to quit England, shall be held to bail for such sum as such judge shall think fit, not exceeding the amount of the debt or damages, and thereupon it shall be lawful for such plaintiff, within the time which shall be expressed by such order, but not afterwards, to sue out one or more writ or writs of *capias*, into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this Act annexed, and shall bear date on the day on which the same shall be issued:" (§ 3.) And "any such special order may be made, and the defendant arrested in pursuance thereof, at any time after the commencement of such action, and before final judgment shall have been obtained therein; and that a defendant in custody upon any such arrest, and not previously served with a copy of the writ of summons, may be lawfully served therewith:" (s. 5.) The arrestable amount is also 20*l.* in the palatine counties, whether the process issue from the superior or the palatine courts.⁽¹⁾ A defendant cannot be held to bail in an action on a penal statute,⁽²⁾ unless the statute expressly authorize it;⁽³⁾ nor in *scire facias*;⁽⁴⁾ nor in actions of account;⁽⁵⁾ nor in actions on contract, where the legality is doubtful;⁽⁶⁾ nor on a *replevin* or bail bond;⁽⁷⁾ though, after judgment against

(1) *Brown v. McMillan*, 7 M. & W. 196; 8 Dowl. 852. So in Wales: 11 Geo. 4 & 1 Will. 4, c. 70.

(2) *Whittingham v. Coghlan*, Barnes, 80; *St. George's case*, Yelv. 53.

(3) *Holland v. Bothmar*, 4 T. R. 228; *R. v. Horne*, Id. 349; *Goodwin v. Parry*, Id. 578; but in actions on remedial statutes the defendant may be held to bail: *Turner v. Warren*, 2 Str. 1079; *Wheeler v. Copeland*, 5 T. R. 364.

(4) *Agassiz v. Palmer*, 1 D. & L. 18; 6 Sc. N. R. 603.

(5) *Pryor v. Pettingell*, 2 Dowl. N. S. 755.

(6) *Sumner v. Green*, 1 H. Bl. 301.

(7) *Ormond v. Brierly*, 1 Salk. 99; *Brandon v. Robson*, 6 T. R. 336; *Mellish v. Petherick*, 8 T. R. 450.

the bail, the latter may be held to bail in an action on the judgment.⁽¹⁾ In other cases, and where the damages are unliquidated, the judge will not grant an order to hold to bail, unless the circumstances show that the damages would exceed theailable amount.⁽²⁾

If the action is on a judgment of the superior court in a previous action, in which the defendant was held to bail, he cannot be held to bail again,⁽³⁾ though the bail in the former action became insolvent, or absconded, or the defendant was superseded.⁽⁴⁾

2. *Affidavit to hold to Bail.*

On making the application to a judge for an order to hold to bail, an affidavit is necessary, and if it is informal, the party, arrested under a *capias* thereupon, may bring an action for false imprisonment.⁽⁵⁾

(a) *Title.*—The affidavit to be made by the party should be intituled in the cause, if the writ of summons has been already issued,⁽⁶⁾ unless it is sworn before a judge of the court in which the action is brought.⁽⁷⁾ It ought also to be intituled of the court in which the action is brought, or intended to be brought; but it is mere surplusage, and no objection sufficient to set aside the order, that it is so intituled, though made before such writ has issued.⁽⁸⁾

Name of defendant.—The name of the defendant should be stated in full, both as to the christian and surname;⁽⁹⁾ though his addition is unnecessary. In actions on bills of exchange, promissory notes, and other

⁽¹⁾ *Prendergast v. Davis*, 8 T. R. 85.

⁽²⁾ *Bullock v. Jenkins*, 1 L. M. & P. 645; see post, "Affidavit—Cause of Action."

⁽³⁾ *Kendal v. Carey*, 2 W. Bl. 768; *Chambers v. Robinson*, 2 Str. 782.

⁽⁴⁾ *Bowen v. Barnett*, Sayer, 160; *Crutchfield v. Seyward*, 2 Wils. 93; *Chambers v. Robinson* 2 Str. 782.

⁽⁵⁾ *Reddell v. Pakeman*, 2 C. M. R. 30; 3 Dowl. 714. And the defendant in this action may justify under the writ, if not set aside: *Ibid.*

⁽⁶⁾ *Schletter v. Cohen*, 7 M. & W. 389; 9 Dowl. 277.

⁽⁷⁾ Rule Pr. 144, H. T. 1853.

⁽⁸⁾ *Hargraves v. Hayes*, 24 L. J. 281, Q. B.; 35 E. & B. 272. As to the proper mode of intituling, and deponent's abode, see post, "Affidavits."

⁽⁹⁾ *Waters v. Joyce*, 1 D. & R. 150; *Reynolds v. Hawkin*, 4 B. & Ald. 536; *Lake v. Silk*, 3 Bing. 296.

written instruments, if the christian names are designated in the instrument by initials, it is enough to insert those initials.⁽¹⁾ Moreover, "in any case where the defendant is described in the writ of *capias*, or affidavit to hold to bail, by initials, or by a wrong name, or without a christian name, the defendant shall not be discharged out of custody, or the bail bond delivered up to be cancelled on motion for that purpose, if it shall appear to the court that due diligence has been used to obtain knowledge of the proper name."⁽²⁾ Where there are two or more affidavits as to the respective material facts, care should be taken to identify the defendant as the person spoken of in each affidavit.

That action has been brought.]—The affidavit should state that the action has been brought, if such is the case;⁽³⁾ or that it is intended to sue out such writ, for the affidavit may be sworn before the writ is issued.⁽⁴⁾

(b) *That defendant is about to quit England.*]—It is not enough, that the deponent should state that he verily believes the defendant is about to quit England, his belief being immaterial, provided he set forth facts sufficient to induce the judge to draw that inference.⁽⁵⁾ The affidavit of the facts should, as in other cases, be made by some person cognizant of them; and a third person, refusing to make an affidavit, may be compelled to be examined.⁽⁶⁾ Where the deponent derives his information from another person, he ought to state his own belief, and also the name and description of such informant.⁽⁷⁾ The kind of absence necessary to be shown is such as would prevent the plaintiff, if successful, suing out a *ca. sa.*; ⁽⁸⁾ as, where an officer is about to join his regiment in India;⁽⁹⁾ or where a party is

(1) 3 & 4 Will. 4, c. 42, s. 12.

(2) Rule Pr. 82, H. T. 1853. As to what is due diligence, see *Hicks v. Marreco*, 1 Cr. & M. 84; 3 Tyr. 216; *Ladbroke v. Phillips*, 1 Har. & W. 109; *Rossett v. Hartley*, id. 581.

(3) *Bullock v. Jenkins*, 1 L. M. & P. 645.

(4) *King v. Reginam*, 14 Q. B. 31.

(5) *Hargraves v. Hayes*, 24 L. J. 281, Q. B.; 5 E. & B. 272; *Balman v. Dunn*, 5 Bing. N. C. 49; 7 Dowl. 105.

(6) C. L. P. Act, 1854, s. 48.

(7) *Graham v. Sandrinelli*, 16 M. & W. 191; *Gibbons v. Spalding*, 11 M. & W. 174; 2 Dowl. N. S. 811.

(8) *Larchin v. Willan*, 4 M. & W. 351; 7 Dowl. 11.

(9) *Askenheim v. Colegrave*, 13 M. & W. 620.

about to go to Ireland, where his residence is; ⁽¹⁾ but not where a captain is going on one of his regular voyages to Hamburg; ⁽²⁾ nor where the defendant did not intend leaving England for two months; ⁽³⁾ nor where the defendant was going to Scotland, where he had a few days before been adjudicated a bankrupt. ⁽⁴⁾ Yet it need not be stated expressly that the defendant is about to quit England “unless forthwith apprehended.” ⁽⁵⁾

Statement of the cause of action.]—The cause of action should be stated as nearly as possible in the terms used in the declaration, and for this purpose the forms of causes of action stated *ante*, p. 131, should be adopted; and it may be stated generally, that the affidavit will be defective if it omit any material part of the forms. And if the declaration varies materially from the affidavit, the bail will be discharged; thus, as to the character in which the plaintiff sues, or defendant is sued, ⁽⁶⁾ or as to the number of plaintiffs or defendants, ⁽⁷⁾ or as to the name of the plaintiff. ⁽⁸⁾ But the affidavit may set forth causes of action in addition to those in the declaration. ⁽⁹⁾ The affidavit must also agree as to the nature of the action with the *capias*. ⁽¹⁰⁾

The affidavit must be positive and precise as to the existence of the cause of action, and must not state it inferentially; thus, “as deponent believes,” or “as appears by the bond or bill,” or “as defendant has admitted.” ⁽¹¹⁾ But less strictness is required where the plaintiff sues as assignee of a bankrupt; ⁽¹²⁾ or assignee of the obligee in a bond; ⁽¹³⁾

⁽¹⁾ *Lamond v. Eiffe*, 3 Q. B. 910; 3 G. & D. 256.

⁽²⁾ *Atkinson v. Blake*, 1 Dowl. N. S. 849.

⁽³⁾ *Pegler v. Hislop*, 1 Exch. 438.

⁽⁴⁾ *Macgregor v. Fiskin*, 5 D. & L. 591.

⁽⁵⁾ *Hargraves v. Hayes*, 24 L. J. 281, Q. B.; 5 E. & B. 272.

⁽⁶⁾ *Marzetti v. Jouffray*, 1 Dowl. 44; *Ilsey v. Ilsey*, *ib.* 310; 2 C. & J. 330. See *Manesty v. Stevens*, 9 Bing. 100.

⁽⁷⁾ *Spalding v. Mare*, 6 T. R. 363.

⁽⁸⁾ *Grindall v. Smith*, 1 M. & P. 24.

⁽⁹⁾ *Taylor v. Wilkinson*, 6 A. & E. 533.

⁽¹⁰⁾ *Green v. Elgie*, 3 B. & Ad. 437; 1 Dowl. 344; *Richards v. Stuart*, 10 Bing. 319; 2 Dowl. 537.

⁽¹¹⁾ *Riou v. Belifante*, 2 Str. 1209; *Kelly v. Devereux*, 1 Wils. 339; Say. 59; *Champion v. Gilbert*, 4 Burr. 2126; *Mackenzie v. Mackenzie*, 1 T. R. 716; *Wheeler v. Copeland*, 5 T. R. 384.

⁽¹²⁾ *Swayne v. Cramond*, 4 T. R. 176. See, where in such case the affidavit was held insufficient, *Rowney v. Deane*, 1 Price, 402; *Molling v. Buckholtz*, 2 M. & Sel. 563.

⁽¹³⁾ *Cresswell v. Lovell*, 8 T. R. 418.

or executor or administrator of the party to whom the debt was due,⁽¹⁾ in which case he may swear his "belief as appears by the books" of the bankrupt or deceased.⁽²⁾ An affidavit of debt by a surviving *partner* must show that the other partner is dead.⁽³⁾ Where the plaintiff sues as assignee of a debt assigned according to a *foreign law*, he must state that by such law an assignee can sue, as the plaintiff is informed and believes.⁽⁴⁾ The affidavit must also, if the action is for *interest*, state there was a contract to pay such interest;⁽⁵⁾ but it need not state the amount of the principal debt, or when interest began to run.⁽⁶⁾ It is not enough to say the defendant is indebted in *trover*;⁽⁷⁾ but it should state that plaintiff was possessed⁽⁸⁾ of the goods, their value, and a conversion, express or implied.⁽⁹⁾ Nor is it sufficient to say that defendant is indebted upon promises;⁽¹⁰⁾ or in the amount "as a balance of accounts."⁽¹¹⁾ If there were mutual accounts, the affidavit should be for the balance only;⁽¹²⁾ unless the defendant has refused to furnish an account of his set-off.⁽¹³⁾ If the cause of action is on a guarantee, it should state the guarantee, and that the time for payment has elapsed.⁽¹⁴⁾ If there is a condition precedent to the money becoming due, it ought to be set forth.⁽¹⁵⁾ Where the damages are unliquidated, it is enough if the judge, from the nature of the case, can conclude that damage to

(1) *Sheldon v. Baker*, 1 T. R. 87; *Coppice v. Copper*, 10 Bing. 413; 2 Dowl. 785; 4 M. & Sc. 272.

(2) *Lowe v. Farley*, 1 Chit. R. 92.

(3) *Edgar v. Watt*, 1 H. & W. 108. See *Morrell v. Parker*, 6 Dowl. 123.

(4) *Scuerhop v. Schmannel*, 4 D. & R. 180; *Tenons v. Mari*, 8 B. & C. 638; *De La Vega v. Vianna*, 1 B. & Ad. 284.

(5) *Neale v. Snoulten*, 3 D. & L. 422; 2 C. B. 320; *Cullum v. Leeson*, 2 Dowl. 381; *Drake v. Harding*, 4 Dowl. 34; 1 H. & W. 364.

(6) *White v. Sowerby*, 3 Dowl. 581; 1 H. & W. 364.

(7) *Hubbard v. Pacheco*, 1 H. Bl. 218.

(8) *Woolley v. Thomas*, 7 T. R. 550.

(9) *Molling v. Buckholtz*, 2 M. & Sel. 563; *Anon.* 1 Chit. R. 168. See cases sufficiently stated: *Charter v. Jaques*, Cowp. 529; *Emerson v. Hawkins*, 1 Wils. 335; *Imlay v. Ellessen*, 2 East, 453.

(10) *Cope v. Cook*, 2 Doug. 467.

(11) *Polleri v. De Souza*, 4 Taunt. 154; *Jones v. Collins*, 6 Dowl. 528.

(12) *Bromfield v. Archer*, 5 B. & Ald. 513; 1 D. & R. 67; *Austin v. Debnam*, 3 B. & C. 139; 4 D. & R. 653.

(13) *Germain v. Burrows*, 5 Taunt. 259; *Sims v. Jaquet*, 10 Bing. 510.

(14) *Angus v. Robilliard*, 2 Dowl. 90.

(15) *Elworthy v. Maunder*, 5 Bing. 295.

the amount of 20*l.* has been sustained.⁽¹⁾ Where the damages are liquidated, it is not enough to state that they are so;⁽²⁾ but it must state the agreement and breach.⁽³⁾ In cases of actions on bonds for payment of money, or to perform a covenant, the amount stated should be the sum and interest actually due, or the real damages, and not the penalty;⁽⁴⁾ but where the bond is to secure a contract, and the penalty is in the nature of liquidated damages, the penalty may be sworn as the amount due.⁽⁵⁾ Where the promise or contract was not under seal, the consideration must be stated.⁽⁶⁾ So, if a condition precedent to the right of action existed, the performance of it ought to be stated.⁽⁷⁾

Yet the true rule on the subject is, that if what is stated is enough to raise the presumption that a debt existed, and there is nothing to show any circumstances disentitling the plaintiff to the order for an arrest, that order will not be set aside.⁽⁸⁾ The affidavit has accordingly been held sufficient where it stated the cause of action thus: for materials found, goods sold and delivered, and work done by the plaintiff to and for the use of the defendant;⁽⁹⁾ for money had and received on account of the plaintiff, without the words "by the defendant;"⁽¹⁰⁾ for 20*l.* lent on a bill of exchange for 37*l.*, drawn by A. on, and accepted by, defendant, and now overdue and unpaid, without stating to whom lent;⁽¹¹⁾ for use, &c., of a house, &c., of the plaintiff, held by the defendant as tenant thereof,

⁽¹⁾ *Bullock v. Jenkins*, 1 L. M. & P. 645.

⁽²⁾ *Chambers v. Ward*, 1 Dowl. 139.

⁽³⁾ *Willey v. Thornton*, 2 East, 409; *Stinton v. Hughes*, 6 T. R. 13.

⁽⁴⁾ *Talbot v. Hodson*, 7 Taunt. 251; *Anderson v. Bell*, 2 Cr. & J. 630; *Edwards v. Williams*, 5 Taunt. 247; 1 Sid. 63.

⁽⁵⁾ *Kirk v. Strickland*, Doug. 449. See causes of action on deed, *Barnard v. Neville*, 3 Bing. 126; 10 Moore, 475; *Masters v. Billing*, 3 Dowl. 751; on bond, *Byland v. King*, 7 Taunt. 275; 1 Moore, 24; *Bosanquet v. Fillis*, 4 M. & Sel. 330; *Chambers v. Ward*, 1 Dowl. 139; *Smith v. Kendall*, 7 D. & R. 232; on an award, *Anon.* 1 Dowl. 5; *Drier v. Hood*, 7 B. & C. 494; *Jenkins v. Laws*, 1 B. & P. 365; *Masel v. Angell*, 6 D. & R. 15; on an indenture, *Jones v. Collins*, 6 Dowl. 528.

⁽⁶⁾ *Walker v. Gregory*, 1 Dowl. 24; *Macpherson v. Lovie*, 1 B. & C. 108; 2 D. & R. 69.

⁽⁷⁾ *Ehoorthy v. Maunder*, 5 Bing. 295; *Young v. Dowlman*, 2 Y. & J. 31; *Taylor v. Higgins*, 3 East, 169.

⁽⁸⁾ *Hargraves v. Hayes*, 24 L. J. 281, Q. B.; 5 E. & B. 272.

⁽⁹⁾ *Lucas v. Godwin*, 4 Sc. 502; 3 Hodg. 32; the objection being that the latter words applied only to "work done," and not to the "goods sold," &c.

⁽¹⁰⁾ *Coppinger v. Beaton*, 8 T. R. 338.

⁽¹¹⁾ *Bennet v. Dawson*, 1 Moo. & P. 594; 4 Bing. 609.

without saying as tenant to the plaintiff, or held at his request ;⁽¹⁾ for hire of carriages of plaintiff, hired to and for the use of the defendant, without stating of or by whom hired ;⁽²⁾ for work done by plaintiff, in and about the printing of a book of defendant's, and at his request ;⁽³⁾ for money expended and wages due to plaintiff for services on board defendant's ship, without stating " due from the defendant." ⁽⁴⁾

In an action on a *penal statute*, the affidavit should state concisely the offence, and that the forfeiture has been incurred.⁽⁵⁾ The statute must be correctly described : thus, " 27 Geo. 3 " for " 22 Geo. 3 " is bad.⁽⁶⁾

Where *several causes of action* are included in the action, and one entire sum is claimed, the affidavit is good, without distinguishing the several sums applicable to each cause.⁽⁷⁾ But it is desirable to state these separately, for if the affidavit be bad as to fact, it may then stand good as to the other causes of action.⁽⁸⁾

Where the action is on a *bill of exchange* or promissory note, the affidavit should show expressly that the money is due and unpaid, or circumstances from which that fact may be directly presumed.⁽⁹⁾ If the bill is payable by instalments, it should show what instalments are unpaid.⁽¹⁰⁾ If the bill is not payable with interest, the affidavit should show that the arrest is made for the principal sum only.⁽¹¹⁾ It should also state the character in which the plaintiff sues, and how the defendant is indebted ; as, if he sues as indorsee, he ought to say so, though, perhaps, it need not mention the name of the indorser,⁽¹²⁾ and intermediate indorsements

(1) *Lee v. Sellwood*, 9 Price, 332.

(2) *Brown v. Garnier*, 6 Taunt. 389 ; 2 Marsh. 83.

(3) *Gale v. Leckie*, 6 M. & Sel. 228.

(4) *Symonds v. Andrews*, 1 Marsh. 317.

(5) *Davies v. Mazzinghi*, 1 T. R. 705 ; *Watson v. Shaw*, 2 T. R. 654.

(6) *Ibid.*

(7) *Hague v. Levi*, 9 Bing. 595 ; 1 Dowl. 720.

(8) *Jones v. Collins*, 6 Dowl. 526 ; *Cunliffe v. Maltass*, 7 C. B. 695 ; 6 D. & L. 723 ; *Bank of England v. Reid*, 7 M. & W. 152.

(9) *Kirk v. Almond*, 1 Dowl. 318 ; 2 C. & J. 354 ; *Halcomb v. Lambkins*, 2 M. & Sel. 475 ; *Jackson v. Yate*, *ibid.* 148 ; *Edwards v. Dick*, 3 B. & Ald. 495 ; *Walmsley v. Dibdin*, 4 M. & P. 10.

(10) *Hart v. McGerris*, 3 Tyr. 238.

(11) *Brook v. Colman*, 2 Dowl. 7 ; 1 Cr. & M. 621 ; *Westmacott v. Cook*, 2 Dowl. 519 ; *Latraile v. Hoepfer*, 10 Bing. 334 ; 2 Dowl. 758.

(12) *Mammon v. Mathew*, 4 M. & Sc. 356 ; 10 Bing. 506 ; *Bradshaw v. Saddington*, 7 East, 94. But see *Lewis v. Gompertz*, 2 C. & J. 352 ; 1 Dowl. 319.

need not be stated.⁽¹⁾ Where the defendant is drawer or indorser, the presentment to and default of the acceptor, or something equivalent, must be stated, though not notice of dishonour.⁽²⁾ It is not enough to say that several persons are jointly indebted on a bill accepted by them, or one of them.⁽³⁾

Where the cause of action is on the *common counts*, particular attention should be given so as not to omit the words "by, or from the plaintiff," "to or for the use of the defendant," or "at the request of the defendant," as the case may be; for many affidavits have been held insufficient for either omitting some of these words, or stating loosely the privity of the parties.⁽⁴⁾ Thus, an affidavit which states that a party is indebted for goods bargained and sold, without stating that they are delivered, is not sufficient.⁽⁵⁾

(d) *Form of Affidavit to hold to Bail.*

In the Q. B. ["C. P." or "Exch. of Pleas."]

Between A. B., plaintiff,

and

C. D. defendant.⁽⁶⁾

I, E. F. of , clerk to A. B. of , in the county of , merchant, make oath and say:

1. That C. D. of [the above named defendant], is justly and truly indebted unto the said A. B. in the sum of £ , [for money payable by the said C. D. to the said A. B. for (*here state the cause of action as in forms of declaration, ante*, p. 131, *thus*, "for goods bargained and sold by the said A. B. to the said C. D.," or "for that the said C. D., on the day of , 18 , by his promissory

⁽¹⁾ *Luce v. Irwin*, 6 Dowl. 29; *Tidd N. P.* 122.

⁽²⁾ *Simpson v. Dick*, 4 Dowl. 731; *Jones v. Collins*, 6 Dowl. 526; *Hopkins v. Salembier*, 5 M. & W. 423; 7 Dowl. 493.

⁽³⁾ *Harmer v. Ashby*, 10 Moore, 323.

⁽⁴⁾ See, where those material words, or some of them, were omitted, *Perks v. Levern*, 7 East, 194; *Taylor v. Forbes*, 11 East, 315; *Young v. Gatien*, 2 M. & Sel. 603; *Cathron v. Haggart*, 8 East, 106; *Fenton v. Ellis*, 6 Taunt. 192. See also *Bell v. Thrupp*, 2 B. & Ald. 596; *Fricke v. Poole*, 9 B. & C. 543; 4 M. & R. 448; *Visger v. Delegal*, 2 B. & Ad. 571; *Stratton v. Matthews*, 3 Exch. 480, 1 Dowl. 333; *Kelly v. Curzon*, 4 A. & E. 622; *Smith v. Heap*, 5 Dowl. 11. "For money had and received to the use of defendant's wife," is bad, *Wade v. Wade*, 4 Bing. 50; *Morgan v. Baylis*, 3 Dowl. 117.

⁽⁵⁾ *Pontifex v. De Maltzoff*, 1 Exch. 436.

⁽⁶⁾ If the writ of summons has not been issued, the title of the cause need not be given, *Hollis v. Brandon*, 1 B. & P. 36; *Green v. Redshaw*, *id.* 227; but, if given, the affidavit would not be bad, *Hargreaves v. Haines*, 25 L. T. 161, Q. B.; 5 E. & B. 272.

note, now overdue, promised to pay to the said A. B. £ two months after date, and did not pay the same."]

2. And I further say that the said C. D., in a conversation which I had with him on the day of , informed me that he was about [to proceed without delay to [or state the facts which show the intention to quit the country, after which may be added], "and, for the reasons aforesaid, I verily believe that the said C. D. is about to quit England unless he be forthwith apprehended."

3. And I further say that the said A. B. hath caused a writ of summons to be sued out of this honourable court at the suit of the said A. B. against the said C. D.

Sworn,⁽¹⁾ &c.

E. F.

By whom, when, and how sworn.—The affidavit may be made by one or more persons, or there may be two or more affidavits as to different portions of the matter required; or an affidavit made in a cause at the suit of a different plaintiff and in another court may be used.⁽²⁾ Any person cognizant of the facts may make the affidavit, and he need not state any connection between the plaintiff and himself.⁽³⁾ The affidavit may be sworn before the officer or the deputy officer, who issues the *capias*.⁽⁴⁾ If sworn abroad, it must have the same requisites as when sworn in this country.⁽⁵⁾ It may be sworn before the issuing of the writ of summons.⁽⁶⁾ The affidavit is stale after it is a year old; and a judge will not act upon it, for the debt may have since been satisfied.⁽⁷⁾

3. Judge's Order to hold to Bail.

The judge's order may be applied for at any time after the commencement of the action, i. e. after the issuing of the writ⁽⁸⁾ and before final judgment.⁽⁹⁾ It may be applied for

(1) The jurat should be signed by the judge before whom it was sworn, before the order is made and acted on, otherwise it is irregular, *Bill v. Bament*, 8 M. & W. 317; 9 Dowl. 810.

(2) *Langston v. Wetherell*, 14 M. & W. 104.

(3) *Holliday v. Lawes*, 3 Bing. N. C. 541; *Short v. Campbell*, 3 Dowl. 487; 1 Gale, 60.

(4) 12 Geo. 1, c. 29; *Rogers v. Jones*, 9 D. & R. 878.

(5) *Nesbitt v. Pym*, 7 T. R. 376 n.

(6) *King v. Reginam*, 14 Q. B. 31.

(7) *Ramsden v. Maugham*, 2 C. M. & R. 634; 4 Dowl. 403; *Collier v. Hague*, 2 Str. 1270.

(8) *King v. Reginam*, 14 Q. B. 31.

(9) 1 & 2 Vict. c. 110, s. 6.

even before the writ has been served.⁽¹⁾ It cannot be applied for, during a stay of proceedings in the cause by order of a judge.⁽²⁾ The application must be made to a judge at chambers or elsewhere, and not to the court.⁽³⁾ And the judge has a discretion as to making the order, however clear the affidavits may be.⁽⁴⁾ If the judge make an order which he is not authorized by the statute to make, the sheriff is not bound to execute it.⁽⁵⁾ The order cannot be revoked; and the only remedy is to discharge the defendant out of custody where the arrest is unfounded, and not to set the order aside.⁽⁶⁾

The first thing to be done is to issue the writ of summons, then prepare the affidavit, and get it sworn and go before a judge at chambers, who will, if the affidavit is sufficient, make the order. The affidavit is left with the judge's clerk who draws up the order. The *capias* may then be sued out.

4. Writ of Capias.

(a) *Form of writ.*]—"It shall be lawful for the plaintiff, within the time which shall be expressed in the judge's order, but not afterwards, to sue out one or more writ or writs of *capias* into one or more different counties, as the case may require, against any such defendant so directed to be held to bail, which writ of *capias* shall be in the form contained in the schedule to this act annexed, and shall bear date on the day on which the same shall be issued: provided always, that the said writ of *capias*, and all writs of execution to be issued out of the superior courts of law at Westminster into the counties palatine of Lancaster and Durham, shall be directed to the chancellor⁽¹⁾ of the county Palatine of Lancaster or his deputy there, or to the chancellor of the county Palatine of Durham or his deputy there."⁽²⁾ The writ of *capias* thus issues only in pursuance of a judge's

⁽¹⁾ *Brook v. Snell*, 8 Dowl. 370.

⁽²⁾ *Ball v. Stanley*, 6 M. & W. 396; 8 Dowl. 344.

⁽³⁾ *Barnett v. Crow*, 1 Dowl. N. S. 774; *Bentley v. Berry*, 7 M. & W. 146.

⁽⁴⁾ *Hitchcock v. Hunter*, 5 Jur. 770.

⁽⁵⁾ *Brown v. McMillan*, 7 M. & W. 196.

⁽⁶⁾ *Burness v. Guiranovich*, 4 Exch. 520.

⁽⁷⁾ Writs into the counties palatine are now delivered to the sheriff, and executed as in other cases; C. L. P. Act, 1852, s. 122.

⁽⁸⁾ 1 & 2 Vict. c. 110, s. 3.

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order, and therefore in cases where such order can be obtained. The form is prescribed by the statute 1 & 2 Vict. c. 110, s. 3,⁽¹⁾ which is imperative in requiring it to be followed.⁽²⁾

Form of Capias.

VICTORIA, &c. To the sheriff of _____, [or to the constable of Dover Castle, or to the mayor and bailiffs of Berwick-upon-Tweed, or, as the case may be], greeting: We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same and take C. D. (or, if several defendants, state name and residence of each), if he shall be found in your bailiwick, and him safely keep, until he shall have given you bail or made deposit with you according to law in an action on promises [or of debt, &c.], at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody. And we do further command you that, on execution hereof, you do deliver a copy hereof to the said C. D. And we hereby require the said C. D. to take notice that within eight days after the execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our court of _____ to the said action, and that in default of so doing such proceedings may be had and taken as are mentioned in the warning written or indorsed herein. And we do further command you that, immediately after the execution hereof, you do return this writ to our said court of ⁽³⁾ _____, together with the manner in which you shall have executed the same, and the day of the execution thereof, or if the same shall remain unexecuted, then that you do so return the same at the expiration of one calendar month from the date hereof, or sooner if you shall be thereto required by order of the said court, or by any judge thereof.

Witness⁽⁴⁾ _____ at Westminster [or, as the case may be], the day of _____.

Memorandum to be subscribed to the Writ.

This writ is to be executed within one calendar month⁽⁵⁾ from the date thereof, including the day of such date and not afterwards.

⁽¹⁾ The form of *capias* applicable to a discharged insolvent, referred to by 1 & 2 Vict. c. 110, s. 85, is the form prescribed by 2 Will. 4, c. 39, given *ante*, p. 718.

⁽²⁾ *Smith v. Crump*, 1 Dowl. 519; *Davies v. Parker*, 2 Dowl. 538; *Richard v. Stuart*, 10 Bing. 319; 3 M. & Sc. 774.

⁽³⁾ Here should be correctly stated the court out of which the writ issued, *Mayhew v. Hoadley*, 6 Dowl. 629.

⁽⁴⁾ The writ is tested, like a writ of summons, in the name of the chief of the court, or, during a vacancy, in that of the senior puisne judge, see *ante*, p. 86.

⁽⁵⁾ After the expiry of the month, if the writ is unexecuted, a new order for a fresh *capias* must be obtained.

A warning to the Defendant.

If a defendant having given bail on the arrest shall omit to put in special bail as required, the plaintiff may proceed against the sheriff, or on the bail-bond.

Indorsements to be made on the Writ.

Bail for⁽¹⁾ £ , by order of (*naming the judge making the order.*) Dated this day of .

This writ was issued by E. F., of , attorney for the plaintiff [or plaintiffs] within named.

Or,

This writ was issued in person by the plaintiff within named, who resides at [*mention the city, town or parish, and also the name of the hamlet, street and number of the house of the plaintiff's residence, if any such there be.*]

Concurrent writ.]—Concurrent writs may be issued,⁽²⁾ but it seems the defendant would be liable only for the costs of the writ with which he may be served.⁽³⁾

(b) Requisites of Capias.

How sued out.]—A blank writ may be obtained at a law-stationer's. Fill it up and make out a *præcipe*, and take both, together with the judge's order, to the proper office. Leave the order and *præcipe* and get the writ stamped by the officer; after which make out a correct copy or copies for service. Take the writ and copies and leave them at the sheriff's office, or the office of the London deputy of a county sheriff. There is no difference as to the sheriff of a county palatine.⁽⁴⁾

Direction of writ.]—The writ is directed to the sheriff as in case of a writ of execution.⁽⁵⁾ It cannot be directed to

⁽¹⁾ This is the sum specified in the judge's order to hold to bail; and an amendment was allowed in *Plock v. Pacheco*, 9 M. & W. 342; 1 Dowl. N. S. 380. The writ has been set aside for an error in the amount, *Cook v. Cooper*, 7 A. & E. 605; 2 N. & P. 607. If there are several sums sworn to in the affidavit, the aggregate only need be indorsed, *Evans v. Bidgood*, 4 Bing. 63; 12 Moore, 236.

⁽²⁾ 1 & 2 Vict. c. 110, s. 3.

⁽³⁾ See *Dunn v. Harding*, 10 Bing. 553; 2 Dowl. 803; *Angus v. Coppard*, 3 M. & W. 57.

⁽⁴⁾ C. L. P. Act, 1852, s. 122.

⁽⁵⁾ See *ante*, p. 563.

any other than the sheriff, as, for instance, to the keeper of the Queen's prison.⁽¹⁾

Names of the parties.]—The name of the plaintiff should be correctly inserted in the *capias*, as in the affidavit; thus, "W. B." instead of "W. B. the younger," which was the name in the affidavit, is bad.⁽²⁾ Yet, where the plaintiff was described in the affidavit, as one of the public officers for the Western District Banking Company for Devon and Cornwall, but the words "for Devon and Cornwall" were omitted in the *capias*, the plaintiff was allowed to file a fresh affidavit with those words left out.⁽³⁾ The names of all the plaintiffs should be inserted. The defendant's christian and surname should also be stated in full, or, if the action is on a bill of exchange or written instrument, and the defendant has signed by initial or some contraction of the christian name, it is sufficient to use such contraction.⁽⁴⁾ Besides, where initials, or a wrong name, or no christian name is used, the writ will be good, provided due diligence has been used to obtain knowledge of the proper name.⁽⁵⁾ In cases not within the statute and rule the defendant, if arrested without his name being inserted correctly, may be discharged and the bail-bond cancelled;⁽⁶⁾ and he has an action against the sheriff for false imprisonment;⁽⁷⁾ unless he has gone by such wrong name,⁽⁸⁾ or has himself represented it to be his real name,⁽⁹⁾ or it sounds like his right name, as Mortlock for Mortlake,⁽¹⁰⁾ or he has signed a bail-bond in the same wrong name.⁽¹¹⁾ But if he has signed the bond in his right name, it will be no waiver of the irregularity.⁽¹²⁾ But the sheriff is not bound to execute the writ, if the defendant is misnamed, or not fully named; though, if the defendant is

(1) *Edwards v. Robertson*, 5 M. & W. 520.

(2) *Bilton v. Clapperton*, 9 M. & W. 473; 1 Dowl. N. S. 386.

(3) *Richards v. Disprails*, 1 Dowl. N. S. 384; 9 M. & W. 459.

(4) 3 & 4 Will. 4, c. 42, s. 12.

(5) Rule Pr. 82 H. T. 1853.

(6) *Ladbroke v. Phillips*, 1 H. & W. 109.

(7) *Finch v. Cocken*, 3 Dowl. 678; 2 C. M. & R. 196.

(8) *Walker v. Willoughby*, 6 Taunt. 530; 2 Marsh. 230; *Newton v. Maxwell*, 2 C. & J. 215; 1 Dowl. 315.

(9) *Morgans v. Bridges*, 1 B. & Ald. 647; *Brunskill v. Robertson*, 9 A. & E. 846; *Fisher v. Magnay*, 6 Sc. N. R. 602.

(10) *Macdonald v. Mortlock*, 2 D. & L. 963; *Homan v. Tidmarsh*, 11 Moore, 231.

(11) *Kingston v. Llewellyn*, 1 B. & B. 529; 4 Moore, 317.

(12) *Murray v. Hubbert*, 1 B. & P. 645; *Lake v. Silk*, 3 Bing. 296; 11 Moore, 57; *Ogden v. Barker*, 1 Dowl. 125.

known by the wrong name, he may be justified in doing so.⁽¹⁾ Where the defendant has been misnamed in the *capias*, he should apply to the court or a judge at chambers for his discharge before undertaking to put in bail,⁽²⁾ or obtaining time to do so,⁽³⁾ and before the time to put it in has expired.⁽⁴⁾ The court, in granting the discharge, generally refuses the defendant the costs of the application, unless he undertake to bring no action against the sheriff.

It seems to be safer to state the character in which the plaintiff sues and the defendant is sued.⁽⁵⁾ If there are several defendants, the names of those only included in the judge's order should be inserted in the *capias*.

Addition and place of abode of parties.—The addition and place of abode of the parties, it seems, need not be inserted, though the form in the act 1 & 2 Vict. c. 110, apparently contemplated that they should; and to avoid any objection it is always safer to insert them. Where the plaintiff sues out the writ in person, he must indorse his residence on the back thereof. The defendant's residence was required to be inserted under the form of *capias* given by 2 & 3 Will. 4, c. 39.⁽⁶⁾

Form of action.—At the time the form of writ was given, the form of action required to be stated in the writ of summons, which is now unnecessary. It must, however, still be stated concisely in the *capias*, as the form prescribed by the act contains it; otherwise the writ may be set aside.⁽⁷⁾

Return day.—The sheriff must return the writ as soon as it is executed,⁽⁸⁾ or if it cannot be executed; and it cannot be executed after one calendar month.⁽⁹⁾

⁽¹⁾ *Brunskill v. Robertson*, 9 A. & E. 840. But see *Morgans v. Bridges*, 1 B. & Ald. 647.

⁽²⁾ *Holliday v. Lawes*, 3 Bing. N. C. 541.

⁽³⁾ *Moore v. Stockwell*, 6 B. & C. 76; 9 D. & R. 124.

⁽⁴⁾ *Foones v. Stokes*, 4 Dowl. 125; *Newnham v. Hannay*, 5 Dowl. 263; *Sugars v. Concannon*, 5 M. & W. 30; 7 Dowl. 391.

⁽⁵⁾ *Manesty v. Stevens*, 9 Bing. 400; 1 Dowl. 711. But see *Ilsey v. Ilsey*, 2 Cr. & J. 330; *Ashworth v. Ryal*, 1 B. & Ald. 19.

⁽⁶⁾ *Hill v. Harvey*, 4 Dowl. 163.

⁽⁷⁾ *Munro v. Howe*, 1 Chitt. R. 171; *Mayfield v. Davison*, 10 B. & C. 223.

⁽⁸⁾ *Hodgson v. Mee*, 3 A. & E. 765; 5 N. & M. 302.

⁽⁹⁾ 1 & 2 Vict. c. 110, s. 4, and sch. See as to mode of return, *ante*, p. 612.

How to take advantage of defects in capias.—For any material defect in the writ, the defendant may apply to set aside the writ and to be discharged out of custody. But if the defect is nothing but a mere clerical error, as “se” for “she,” or “Middesex” for “Middlesex,” or a mere omission of an immaterial word in the copy, the court has refused to discharge the defendant.⁽¹⁾ The application to set aside for irregularity is made to a judge at chambers, or to the court, and should be supported by an affidavit. As in other cases, such an application must be made promptly, and before a fresh step has been taken,⁽²⁾ which must generally be within the eight days for putting in bail,⁽³⁾ for the irregularity is generally cured by putting in bail, or paying money in lieu thereof, or undertaking or obtaining time to put in bail.⁽⁴⁾ The plaintiff, on the other hand, may apply to the court to amend the defect, which will be allowed if the defendant has not suffered thereby,⁽⁵⁾ and if the amendment will not prejudice the bail.⁽⁶⁾

If the writ is entirely void, as by being dated on a Sunday,⁽⁷⁾ the defect may be taken advantage of any time during the bailable proceedings.⁽⁸⁾

5. The Arrest.

When the writ of *capias* is sued out, and the necessary number of copies made, these must be taken to the sheriff's or sheriff's deputy's office, with directions to execute the writ, as in the case of a *ca. sa.*, *ante*, p. 563. The statute 1 & 2 Vict. c. 110, s. 4, enacts, that the sheriff or other officer, to whom any such writ of *capias* shall be directed, shall,

⁽¹⁾ *Sutton v. Burgess*, 3 Dowl. 489; *Pocock v. Mason*, 1 Bing. N. C. 245; *Colston v. Berens*, 1 C. M. & R. 833; *Yardley v. Jones*, 4 Dowl. 45.

⁽²⁾ Rules Pr. 135, 136, H. T. 1853, *post*, “Setting aside proceedings.”

⁽³⁾ *Newtonham v. Hanny*, 5 Dowl. 263.

⁽⁴⁾ *Green v. Glassbrook*, 1 Bing. N. C. 516; 1 Sc. 402; *Holliday v. Lawes*, 3 Bing. N. C. 541; *Moore v. Stockwell*, 6 B. & C. 76; 9 D. & R. 124.

⁽⁵⁾ *Moore v. Magan*, 16 M. & W. 95; *Rennie v. Bruce*, 2 D. & L. 946; *Bilton v. Clapperton*, 9 M. & W. 473; 1 Dowl. N. S. 386; *Plock v. Pacheco*, 9 M. & W. 342; 1 Dowl. N. S. 380.

⁽⁶⁾ *Marsh v. Blackford*, 1 Chitt. R. 323; *Bradshaw v. Davis*, *id.* 374.

⁽⁷⁾ *Hanson v. Shackleton*, 4 Dowl. 48.

⁽⁸⁾ *Gurney v. Hopkinson*, 1 C. M. & R. 587; 3 Dowl. 189; *Osborne v. Taylor*, 1 Chitt. R. 400.

within one calendar month after the date thereof, including the day of such date, but not afterwards, proceed to arrest the defendant thereupon. The sheriff must arrest as soon as he can, otherwise he is liable to an action for any damage that may occur;⁽¹⁾ though, it seems, no legal damage necessarily accrues until after the writ is returnable, nor if the defendant is arrested, or bail put in, before the return to the writ is made.⁽²⁾ The sheriff is bound to take with him such a force in executing the *capias* as will enable him to overcome any resistance which he could reasonably anticipate.⁽³⁾ The mode of executing the writ, under a warrant of the sheriff to arrest, addressed to the bailiff, is the same as in executing a *ca. sa.*: (*ante*, p. 596.)

(a) *Who may be arrested.*—In executing the writ, the sheriff must see that he arrest the right party, as named in the writ, for if the writ name the defendant as E. F. instead of C. D., and C. D. is taken, he may have an action of false imprisonment against the sheriff: (see *ante*, p. 774.) The sheriff must also consider whether the defendant is privileged from arrest; as he may incur fine or imprisonment in some cases by arresting such a defendant. It will be necessary, therefore, to state who are privileged, and to what extent.

Royal family and servants.—The following persons are exempt from arrest, both upon mesne and final process:—the royal family,⁽⁴⁾ and the menial and domestic servants of the sovereign; ⁽⁵⁾ even though these may be also engaged in trade.⁽⁶⁾ Under the same class are included the queen's chaplain,⁽⁷⁾ or a priest in ordinary of the chapel royal,⁽⁸⁾ a lord of the bedchamber,⁽⁹⁾ a page of the presence in ordinary,⁽¹⁰⁾ a clerk of the kitchen,⁽¹¹⁾ a candle and fire-lighter to the yeomen of the guards,⁽¹²⁾ the Somerset herald-at-arms,⁽¹³⁾ the

(1) *Brown v. Jarvis*, 1 M. & W. 704; 5 Dowl. 285; *Howden v. Standish*, 6 C. B. 504. The declaration in such action must show that the party issuing the *capias* was a plaintiff, *Williams v. Griffiths*, 3 Exch. 584.

(2) *Randall v. Wheble*, 10 A. & E. 749.

(3) *Howden v. Standish*, 6 C. B. 504.

(4) 2 Inst. 50.

(5) 2 Inst. 631.

(6) *King v. Foster*, 2 Taunt. 167.

(7) *Harvey v. Dakins*, 3 Exch. 267.

(8) *Ex parte Dakins*, 16 C. B. 77.

(9) *Aldridge v. Barry*, 3 Dowl. 450 n.

(10) *Reynolds v. Pocock*, 4 M. & W. 371; 7 Dowl. 4.

(11) *Bartlett v. Hebbes*, 5 T. B. 686.

(12) *Hatton v. Hopkins*, 6 M. & Sel. 271.

(13) *Dyer v. Disney*, 16 M. & W. 312.

serjeant-at-arms in ordinary on the queen.⁽¹⁾ But the privilege is confined to the servants of the sovereign as distinguished from the servants of the consort of the sovereign ; ⁽²⁾ and the privilege does not extend to a gentleman of the queen's privy chamber,⁽³⁾ the fort major or deputy governor of the Tower of London,⁽⁴⁾ or the warden of the Tower.⁽⁵⁾

Peers and members of Parliament.]—A peer of the realm is also privileged from arrest on mesne and final process;⁽⁶⁾ unless he is a peer by patent, who has never sat in Parliament, and is sued by his christian and surname.⁽⁷⁾ A peeress is also privileged, whether in her own right or by marriage; but where she is not a peeress in her own right and afterwards marry a commoner, the privilege is lost.⁽⁸⁾ So Scotch peers and peeresses are privileged ;⁽⁹⁾ and proof of having voted at the election of Scotch representative peers is sufficient to entitle such peer to his discharge.⁽¹⁰⁾ Also Irish peers and peeresses⁽¹¹⁾ are privileged.⁽¹²⁾ Members of the House of Commons are privileged during the sitting of Parliament, and forty days before the time appointed for the meeting or reassembling, and after the prorogation or dissolution ;⁽¹³⁾ but a candidate at the hustings has no privilege.⁽¹⁴⁾

Ambassadors, &c.]—Ambassadors and representatives of foreign states (including a secretary of legation) are privileged from arrest,⁽¹⁵⁾ and they do not lose their privilege by engaging in mercantile transactions.⁽¹⁶⁾ It is doubtful whether the privilege extends to prevent such ambassadors

(1) *Robson v. Doyle*, 25 L. T. 115, Q. B.

(2) *Starkie's case*, 1 Keb. 842.

(3) *Huntley v. Baltine*, 2 B. & Ald. 234.

(4) *Batson v. McLean*, 2 Chitt. Rep. 48.

(5) *Bidgood v. Davies*, 6 B. & C. 84 ; 9 D. & R. 153.

(6) *Countess of Rutland's case*, 6 Rep. 52.

(7) *Lord Banbury's case*, 2 Lord Raym. 1247 ; 2 Salk. 512.

(8) Co. Lit. 16 b. ; *Cassedy v. Stewart*, 2 Scott N. R. 432 ; 9 Dowl. 366.

(9) 5 Anne, c. 8, s. 23 ; *Lord Mordington's case*, Fort. 165.

(10) *Digby v. Lord Stirling*, 8 Bing. 55 ; 1 Dowl. 248 ; 4 M. & Sc. 116.

(11) 39 & 40 Geo. 3, c. 67, s. 4.

(12) *Coates v. Lord Hawarden*, 7 B. & C. 388 ; *Storey v. Birmingham*, 3 D. & R. 488.

(13) *Goudy v. Duncombe*, 1 Exch. 159.

(14) *London's case*, 2 Peck. 268.

(15) 7 Anne, c. 12, s. 3 ; *Taylor v. Best*, 14 C. B. 487, where many authorities are referred to.

(16) *Ibid.* s. 5.

altogether from being sued, or merely to protect their person against the process.⁽¹⁾ The servants *bonâ fide*, and not colourably, employed in the domestic establishment of the ambassador are also privileged from arrest,⁽²⁾ though not living in the house; ⁽³⁾ but if they engage in trade they lose the privilege.⁽⁴⁾ A consul is not within the privilege of an ambassador.⁽⁵⁾ Aliens are in this respect on the same footing as natives.⁽⁶⁾

Bankrupts.]—Any bankrupt who shall, after his certificate shall have been allowed, be arrested for any debt, claim, or demand, proveable under his bankruptcy, shall be discharged upon entering an appearance, and may then plead his bankruptcy.⁽⁷⁾ A court will also discharge him on entering appearance, if he has been arrested in an action on a promise made after certificate to pay such debt; for, by pleading the general issue, he may give the Bankrupt Law Consolidation Act, and the proceedings under it, in evidence.⁽⁸⁾ But if the certificate has been obtained by fraud,⁽⁹⁾ or there are good grounds for disputing its validity,⁽¹⁰⁾ the court would not discharge him;⁽¹¹⁾ for a party has a right, in every case of a judgment obtained in any court by fraud, to reply such fraud in bar.⁽¹²⁾ The certificate itself, bearing the seal of the court, or a copy purporting to be so sealed, is sufficient proof of the proceedings in bankruptcy.⁽¹³⁾ A bankrupt is also privileged temporarily from arrest while arranging with his creditors, provided he has obtained protection from the commissioner in bankruptcy, renewable from time to time;⁽¹⁴⁾ and the court may protect such debtor, while so arranging, against arrest at the suit of any creditor who has received notice, as in case of a

(1) 7 Anne, c. 12, s. 5.

(2) *Darling v. Atkins*, 3 Wils. 33; *Lochwood v. Coysgarne*, 3 Burr. 1676; *Deserisay v. O'Brien*, Barnes, 375.

(3) *Evans v. Higge*, 2 Str. 797; 2 Lord Raym. 1524.

(4) 7 Anne, c. 12, s. 5; *Taylor v. Best*, 14 C. B. 487.

(5) *Viveash v. Becker*, 3 M. & Sel. 284.

(6) See *ante*, p. 3.

(7) 12 & 13 Vict. c. 106, s. 205.

(8) *Ibid.* s. 204.

(9) *Ibid.* s. 207; *Horn v. Ion*, 4 B. & Ad. 78.

(10) *Summers v. Jones*, 6 Dowl. 139; *Stacey v. Frederici*, 2 B. & P. 390.

(11) *Coombes v. Blackall*, 1 Tr. 477; *Hewes v. Mott*, 6 Taunt. 329.

(12) *Shedden v. Patrick*, 1 Macq. H. L. Cas. 535.

(13) 12 & 13 Vict. c. 106, s. 236.

(14) *Ibid.* s. 211.

bankrupt, unless the debtor is about to abscond, or has concealed his effects, or has falsely stated the debt, or contracted it fraudulently.⁽¹⁾ But where the creditor in such a case had indorsed the bill accepted by the debtor, and the indorsee received no notice, though the original creditor had, it was held the indorsee could arrest.⁽²⁾ A bankrupt is also privileged from arrest before certificate, like other parties, while going to attend a hearing of his petition for leave to surrender,⁽³⁾ or to attend a meeting to declare a dividend, years after his last examination.⁽⁴⁾ He is also privileged from arrest before certificate, while he is going to surrender, and for such further time as the commissioner allows for the finishing of his examination, which allowance is indorsed upon the summons of such bankrupt; and on showing such protection, and giving a copy to the officer, he is entitled to be immediately discharged, otherwise the officer shall forfeit 5*l.* per day to the bankrupt, and full costs of recovering the same.⁽⁵⁾ This protection applies to other causes of action than debts proveable under the bankruptcy.⁽⁶⁾ "Coming to surrender" means, as in the case of a witness going to attend a trial, a reasonable time *exade morando et redeundo*.⁽⁷⁾ But if the examination is adjourned *sine die*, and "no protection" is indorsed by the commissioner, the debtor may be arrested, though he may have got a day appointed for his final examination; ⁽⁸⁾ yet if the adjournment has been made, and the commissioner has inadvertently neglected to indorse such adjournment on the summons, the debtor is protected,⁽⁹⁾ provided the statute otherwise gives him protection.⁽¹⁰⁾ So he may be arrested, if the time for surrendering has been enlarged;⁽¹¹⁾ but he is protected while actually going to or returning from the meeting at the enlarged time.⁽¹²⁾ So the debtor may be arrested by detainer during a commitment for contempt for not answering.⁽¹³⁾

(1) 12 & 13 Vict. c. 106, s. 216.

(2) *Levy v. Horne*, 5 Exch. 257.

(3) *Ex parte Jackson*, 15 Ves. 116.

(4) *Arding v. Flower*, 8 T. R. 534; 3 Esp. 117.

(5) 12 & 13 Vict. c. 106, ss. 112, 113, 162; *Norton v. Walker*, 3 Exch. 480.

(6) *Darby v. Brougham*, 5 T. R. 509.

(7) *Kenyon v. Solomon*, Cowp. 156; *Ex parte Donelvey*, 7 Ves. 317. See as to a witness, *ante*, p. 261.

(8) *Ex parte Bailey*, 3 Deac. 43.

(9) *Price's case*, 3 V. & B. 23.

(10) *Ex parte Leigh*, 1 Gl. & J. 261.

(11) Anon. 15 Ves. 1.

(12) *Ex parte Hawkins*, 4 Ves. 691.

(13) *Ex parte Wright*, 2 Gl. & J. 202.

A *Scotch bankrupt* is privileged from arrest or imprisonment in England or Ireland in certain cases, provided he has obtained a warrant of protection or liberation, signed by the lord ordinary or the sheriff. "This warrant, or a copy thereof, certified by one of the bill chamber clerks, shall protect or liberate the debtor from arrest or imprisonment in Great Britain or Ireland, and Her Majesty's other dominions, from civil debt, contracted previous to the sequestration (i. e. the adjudication of bankruptcy), but such warrant of protection or liberation shall not be of any effect against the execution of a warrant of arrest or imprisonment *in meditatione fugae* (i. e. as being about to quit the country), or *ad factum præstandum* (i. e. to do some act ordered by decree or order of a court of equity, or by a rule of court), or for any criminal act."⁽¹⁾ "But every such warrant, that shall not be advertised in the *London* and *Edinburgh Gazettes* within one week after the date of such sequestration, shall be ineffectual."⁽²⁾ A Scotch bankrupt, against whom sequestration has been awarded (i. e. in Scotland, who has been adjudicated a bankrupt), is not entitled to his discharge under the above act, on being arrested in England, on producing a warrant of protection dated subsequently to his arrest; there must be a warrant of liberation, i. e. of discharge from prison.⁽³⁾ But a Scotch bankrupt who has received a warrant of protection, and afterwards comes to England, and is arrested when about to return to Scotland, is entitled to his discharge, for then he is not *in meditatione fugae*.⁽⁴⁾

The Irish Bankrupt Amendment Act, 12 & 13 Vict. c. 107, contains a clause similar to the English act, s. 105, *supra*, rendering a bankrupt, after having his certificate confirmed, free from arrest; and it seems the court in England would discharge the bankrupt if arrested here.⁽⁵⁾

Where the debtor has obtained his certificate of bankruptcy in a *foreign* country, under analogous proceedings to a bankruptcy here, the court here will not discharge the debtor.⁽⁶⁾

Insolvents..]—A person who has obtained his discharge

(1) 2 & 3 Vict. c. 41, s. 18. See also Index, "Bankrupt."

(2) 16 & 17 Vict. c. 53, s. 3.

(3) *McGregor v. Fiskin*, 2 Exch. 226; 5 D. & L. 722.

(4) *Macgregor v. Fiskin*, 5 D. & L. 591.

(5) *Ferguson v. Spencer*, 2 Scott, N. R. 229.

(6) See *De la Vega v. Vianna*, 1 B. & Ad. 284; *Phillips v. Allan*, 8 B. & C. 477.

under the Insolvent Debtors Act cannot be arrested in respect of any debt included in the schedule,⁽¹⁾ and a bail-bond given by such person, will be ordered to be cancelled.⁽²⁾ So, if a promise to pay such debt, or a bill of exchange in respect of it, is the cause of action, he will be discharged, though such bill is in the hands of a *bona fide* indorsee.⁽³⁾ But an insolvent discharged may be arrested by his surety for the arrears of an annuity paid after such discharge, whether or not such arrears became due before.⁽⁴⁾ An insolvent, who has petitioned the court for protection under 5 & 6 Vict. c. 116, amended by 7 & 8 Vict. c. 96, 8 & 9 Vict. c. 127, 10 & 11 Vict. c. 102, and 17 & 18 Vict. c. 16, may also obtain a temporary privilege from all process.⁽⁵⁾ But 5 & 6 Vict. c. 116, s. 2, provides, that nothing therein contained shall be held or construed to hinder or prevent the insolvent from being arrested or held to bail under the authority of any judge's order, notwithstanding any protection granted under the authority of that act.

Married woman.—Where a married woman has been arrested, the court will discharge her, whether she be arrested with or without her husband, unless she used deceit before or at the time of obtaining the credit in respect of the debt sued for, or there is a doubt as to the fact of the coverture.⁽⁶⁾ It makes no difference that she is living apart under articles of separation, and with a separate maintenance, if the plaintiff knew the fact.⁽⁷⁾ The affidavit, on which she applies for her discharge, must state as a positive fact that she is married, and not state it inferentially, thus, "as by the certificate hereunto annexed will appear;"⁽⁸⁾ and it seems she ought to make the affidavit herself.⁽⁹⁾ The plaintiff, unless, perhaps,

(1) 1 & 2 Vict. c. 110, s. 90. See *Sammon v. Miller*, 9 B. & C. 770.

(2) *Norton v. Moseley*, 6 B. & C. 106; 9 D. & R. 107; *Dane v. Smith*, 3 D. & R. 600.

(3) *Sherman v. Thompson*, 11 A. & E. 1027.

(4) *Abbott v. Bruere*, 7 Scott, 353; *Freeman v. Burgess*, 4 Bing. 416; 1 M. & P. 91; *Miller v. Green*, 8 Bing. 92; 2 C. & J. 142.

(5) *Bevan v. Walker*, 21 L. J. 161, C. P.; *Blackford v. Hill*, 15 Q. B. 116.

(6) *Partridge v. Clarke*, 5 T. R. 194; *Freame v. Milford*, 1 Cr. & M. 64; *Pitt v. Thompson*, 1 East, 16; *Jones v. Lewis*, 7 Taunt. 55.

(7) *Wardell v. Gooch*, 7 East, 582.

(8) *Harvey v. Cooke*, 5 B. & Ald. 747.

(9) *Jones v. Lewis*, 7 Taunt. 55.

he knew of the coverture, will not be made to pay the costs of the application for discharge,⁽¹⁾ especially if the married woman practised any deception on him.⁽²⁾ Nor, on the other hand, will she be made to pay the plaintiff's costs of the application.⁽³⁾

Executors, &c.]—An executor, administrator, or heir cannot be arrested in respect of the debts of the deceased person he represents, unless he has himself promised, in writing, to pay the debt, in which event he makes the debt his own;⁽⁴⁾ or unless he has committed a *devastavit*, and the action is brought on a judgment.⁽⁵⁾

Infants.]—Infants, it seems, may be arrested, for it is not certain that they will plead infancy in bar to the debt.⁽⁶⁾

Lunatics.]—Lunatics may be arrested, though insane at or after the arrest.⁽⁷⁾

Seamen.]—Petty officers and seamen in Her Majesty's vessels, whose names are on the ships' books,⁽⁸⁾ cannot be arrested for any debt under 30*l.* over and above costs, contracted before entering the service;⁽⁹⁾ but if the debt exceed that sum, on affidavit taken before a judge or commissioner, and indorsed on the back of the writ of summons,⁽¹⁰⁾ together with the ordinary affidavit, a judge's order to arrest may be obtained. If the seaman is arrested contrary to these provisions, any judge of the superior courts, on affidavit of the facts, will discharge him, and award costs against the plaintiff,⁽¹¹⁾ or, if special bail has been put in, will order an *exoneretur* to be entered on the bail-piece.⁽¹²⁾ But if a bail-bond be given, though the bail may render the defendant,⁽¹³⁾ yet if they have allowed proceedings to be taken

(1) *Wilson v. Serres*, 3 Taunt. 307.

(2) *Slater v. Mills*, 7 Bing. 606; 5 M. & P. 603; 1 Dowl. 230.

(3) *Carlisle v. Starr*, 9 Price, 161.

(4) *Mackenzie v. Mackenzie*, 1 T. R. 716.

(5) *Page v. Price*, 1 Salk. 98. See *ante*, p. 658, "Executors.

(6) *Madox v. Eden*, 1 B. & P. 480.

(7) *Nutt v. Verney*, 4 T. R. 121.

(8) *Studwell v. Bunton*, Barnes, 95.

(9) 3 & 4 Will. 4, c. 5, s. 3; c. 6, s. 3.

(10) 1 Geo. 2, stat. 2, c. 14, s. 15.

(11) *Ibid.*; 32 Geo. 3, c. 33, s. 22.

(12) *Robertson v. Paterson*, 7 East, 405.

(13) *Bond v. Isaac*, 1 Burr. 339.

against themselves to judgment, it is too late for them to apply for relief.⁽¹⁾ If the defendant pay the debt, or give a bail-bond, the sheriff is bound to carry him back to one of Her Majesty's ships, or some officer thereof, under a penalty of 100*l.*⁽²⁾

Soldiers and marines.—The annual Mutiny Acts make a similar provision as to soldiers.⁽³⁾ So as to marines.⁽⁴⁾

Parties, counsel, attorneys, &c. in a cause.—All persons connected with a cause and attending at the hearing thereof, whether as parties, counsel, attorneys, witnesses, or bail, are privileged while going to, remaining at, or returning from the place of hearing. But an accused person acquitted on a criminal charge has no privilege as a party in this sense, and he may be arrested even in court.⁽⁵⁾ A barrister is privileged while he has business to attend to,⁽⁶⁾ and it seems, while on circuit, whether he has business or not.⁽⁷⁾ An attorney is privileged also while attending a cause; and in attending a taxation.⁽⁸⁾ But the privilege does not extend to the attorney's clerk.⁽⁹⁾ A person attending to justify as bail is privileged.⁽¹⁰⁾ The privilege of parties, counsel, and attorneys, extend to the Insolvent Court,⁽¹¹⁾ the Bankruptcy Court,⁽¹²⁾ County Courts,⁽¹³⁾ the Sheriff Court while executing a writ of inquiry,⁽¹⁴⁾ an arbitration, if it was directed by a judge at *nisi prius*, or there is a clause for making the submission a rule of court;⁽¹⁵⁾ but a barrister or attorney in search of practice at petty sessions seems not privileged

(1) *Bryan v. Woodward*, 4 Taunt. 457.

(2) 44 Geo. 3, c. 13, ss. 14; *Sturmy v. Smith*, 11 East, 25.

(3) See the Mutiny Act of the year.

(4) See the Marine Mutiny Act of the year.

(5) *Hare v. Hyde*, 16 Q. B. 394. See privilege of witness stated, *ante*, p. 261.

(6) *Newton v. Constable*, 9 Dowl. 933; 2 Q. B. 157; *Newton v. Harland*, 8 Sc. 70.

(7) *Case of Sheriff of Oxfordshire*, 2 C. & K. 200; *Case of Sheriff of Kent*, 2 C. & K. 197.

(8) *Re Hope*, 8 Jur. 856, B. C.

(9) *Phillips v. Pound*, 7 Exch. 881.

(10) *Rimmer v. Green*, 1 M. & Sel. 638.

(11) *Willingham v. Matthews*, 6 Taunt. 356; 2 Marsh. 57.

(12) *Selby v. Hills*, 8 Bing. 166; 1 Dowl. 257.

(13) *Clutterbuck v. Hulls*, 4 D. & L. 80.

(14) *Walters v. Rees*, 4 Moore, 34.

(15) *Randall v. Gurney*, 3 B. & Ald. 252; *Webb v. Taylor*, 1 D. & L. 676.

unless previously retained.⁽¹⁾ The duration of the privilege as to parties, attorneys, and counsel, is identical with that as to witnesses.⁽²⁾

Clergymen.]—A clergyman is privileged from arrest while performing divine service, also *eundo et redeundo*, and a party, knowingly arresting him in these circumstances, is guilty of a misdemeanour and punishable by fine or imprisonment.⁽³⁾

Corporators and hundredors.]—Members of a corporation cannot be held to bail where the act in respect of which the action is brought was done in a corporate capacity;⁽⁴⁾ nor can hundredors be held to bail in an action against the hundred.⁽⁵⁾

Arresting twice for the same cause of action.]—It seems a debtor is not prevented from being arrested twice by the same plaintiff on the same cause of action, especially if he got rid of the previous arrest by subterfuge or fraud,⁽⁶⁾ or by any act implying no default of the plaintiff. The judge will always exercise a discretion in order to prevent vexatious and oppressive proceedings.

Claiming privilege and consequences of arresting privileged persons.]—If the party arrested be privileged, the court, or a judge at chambers will, on motion, discharge him. In some cases, as where the party is a member of the royal family, a peer, peeress, member of parliament, the sheriff and plaintiff are liable to censure and committal by the House of Lords or Commons respectively for arresting such party.⁽⁷⁾ The house will order such person to be immediately discharged,⁽⁸⁾ or the defendant may be discharged immediately on motion in the court from which the process issued,⁽⁹⁾ or by appli-

⁽¹⁾ *Newton v. Constable*, 2 Q. B. 157; 9 Dowl. 933.

⁽²⁾ See *ante*, p. 261.

⁽³⁾ 9 Geo. 4, c. 31, s. 23; 50 Edw. 3, c. 5; 1 Rich. 2, c. 16.

⁽⁴⁾ See *ante*, p. 735, "Corporations."

⁽⁵⁾ See *ante*, p. 699, "Hundredors."

⁽⁶⁾ *Puckford v. Maxwell*, 6 T. R. 52; *Cantellow v. Freeman*, 1 Cr. & M. 536; 2 Dowl. 2. It seems a debtor cannot be arrested a third time on the same cause of action; per Parke, J., *Wells v. Gurney*, 8 B. & C. 771.

⁽⁷⁾ *Le Calé's case*, 48 Lord's Journ. 60, 63; *Hawarden's case*, 60 Com. Journ. 471; *Burton's case*, 75 Com. Journ. 286.

⁽⁸⁾ *Ibid.*

⁽⁹⁾ *Holliday v. Pitt*, 2 Str. 985, 990.

cation to a judge. An Irish peer, on such application, need only make out a *prima facie* title.⁽¹⁾ So in the case of a Scotch peer, proof of his being a peer *de facto*, or having voted at the election of Scotch peers is enough.⁽²⁾ If a member of the House of Commons, the defendant must produce the return of the writ of election, an affidavit not being sufficient,⁽³⁾ but the court will not oblige him to sue out a writ of privilege.⁽⁴⁾ In the case of ambassadors, the sheriff, plaintiff, and attorney, are liable to be punished on summary conviction, for suing out process against them.⁽⁵⁾ But in the case of servants of ambassadors, the names of such must have been previously registered at the office of the sheriff of London and Middlesex,⁽⁶⁾ and they must be *bonâ fide* employed as such servants.⁽⁷⁾ Such servant may be discharged on his own motion, or motion by the ambassador, or some one on behalf of the latter, on producing an affidavit of the *bonâ fide* actual service and of the registration.⁽⁸⁾ If the sheriff refuse to execute the writ against one claiming to be an ambassador's servant, but who is not so *bonâ fide*, an action may be brought against the sheriff, or he may be ruled to return the writ, when the question will arise. In other cases the party entitled to his privilege applies to a judge at chambers, as stated *post*, "Discharge of defendant." In case of a witness or attorney, &c., connected with a cause, he may either apply to the court out of which the record issued, where the proceeding is pending, or to a judge at *nisi prius*.⁽⁹⁾

If the sheriff arrest a privileged person not of the classes above enumerated, it seems no action of trespass can be main-

(1) *Storey v. Birmingham*, 3 D. & R. 488. See *Davies v. Lord Renslesham*, 1 Moore, 410; 7 Taunt. 679.

(2) *Digby v. Lord Stirling*, 8 Bing. 55; 1 Dowl. 248.

(3) *Holliday v. Pitt*, 2 Str. 990.

(4) *Ibid.*; *Goudy v. Duncombe*, 1 Exch. 430.

(5) 7 Anne, c. 12, s. 4.

(6) *Ibid.*; *Heathfield v. Chilton*, 4 Burr. 2017; *Hopkins v. Rees*, 3 T. R. 79.

(7) *Seacombe v. Brownley*, 1 Wils. 20; *Devallo v. Plomer*, 3 Camp.

(8) *Ibid.*; *Heathfield v. Chilton*, 4 Burr. 2015; *Fisher v. Beyrer*, 1 & M. 240; 2 Dowl. 279; *English v. Caballero*, 3 D. & R. 25.

(9) *Attorney-General v. Skinners' Company*, 1 Coop. 1; *Kimpton v. London and North Western Railway Company*, 9 Exch. 766; *Patterson v. Underhill*, 1 Camp. 229. See, p. 262.

tained against him,⁽¹⁾ even after notice of the privilege, unless there has been an order of court for the discharge.⁽²⁾ The sheriff is not bound to arrest a party privileged; but if he does, it seems he is bound to detain the latter until the privilege claimed.⁽³⁾

Wrongful arrest and detainer.]—A person cannot be arrested without a *capias* issued in regular form,⁽⁴⁾ and, if so arrested, he cannot be lawfully detained under another *capias* regularly issued, and the court will discharge him.⁽⁵⁾ So, the court will discharge him, if he has been arrested on sham criminal process on the Sunday, for the purpose of arresting on civil process on the Monday,⁽⁶⁾ though the detainer would be good, if the criminal arrest had been *bonâ fide*.⁽⁷⁾ When once improperly in custody, the defendant cannot be arrested, in returning after his discharge therefrom, though for a totally different cause of action.⁽⁸⁾ Where the defendant has been discharged owing to an illegal arrest, and has been arrested by a third party, the plaintiff cannot lodge a fresh detainer, till he has served the rule for the discharge.⁽⁹⁾ In general, however, where the illegal arrest was by a third party, not colluding with the plaintiff, the latter may detain the defendant.⁽¹⁰⁾ But if the first arrest was illegal, owing to a wrongful act of the sheriff, the defendant cannot be detained by the same plaintiff or another.⁽¹¹⁾

An action lies against the plaintiff for arresting the

⁽¹⁾ *Duncombe v. Church*, 1 Salk. 1; *Watson v. Carroll*, 4 M. & W. 592; *Tarleton v. Fisher*, 2 Doug. 676; *Magnay v. Burt*, 5 Q. B. 381; *Yearley v. Heane*, 14 M. & W. 322; *Ewart v. Jones*, *ibid.* 774.

⁽²⁾ *Magnay v. Burt*, 5 Q. B. 381.

⁽³⁾ *Ibid.*

⁽⁴⁾ *Ex parte Scott*, 9 B. & C. 446; 4 M. & N. 361; *R. v. Blake*, 4 B. & Ad. 355; *Barratt v. Price*, 9 Bing. 566.

⁽⁵⁾ *Hall v. Hawkins*, 4 M. & W. 590; 7 Dowl. 200.

⁽⁶⁾ *Wells v. Gurney*, 8 B. & C. 769. See also *Jacobs v. Jacobs*, 3 Dowl. 675.

⁽⁷⁾ *Goodwin v. Lordon*, 1 A. & E. 378; *Re Douglas*, 3 Q. B. 825.

⁽⁸⁾ *Webb v. Dorwell*, Barnes, 400; *Ex parte Egginton*, 23 L. J. 41 M. C.; 2 E. & B. 717.

⁽⁹⁾ *Pearson v. Yewens*, 5 Bing. N. C. 567.

⁽¹⁰⁾ *Spence v. Stuart*, 3 East, 89; *Barclay v. Faber*, 2 B. & Ald. 743; *Ex parte Egginton*, 23 L. J. 41, M. C.; 2 E. & B. 717.

⁽¹¹⁾ *Barratt v. Price*, 1 Dowl. 725; 9 Bing. 556; *Pearson v. Yewens*, 5 Bing. N. C. 489; 7 Dowl. 451; *Collins v. Yewens*, 10 A. & E. 570; *Robinson v. Yewens*, 5 M. & W. 149; *Hooper v. Lane*, 10 Q. B. 546.

defendant without reasonable and probable cause,⁽¹⁾ and the plaintiff must show in his declaration that the order for a *capias* was obtained by falsehood or fraud.⁽²⁾

Writ of protection.]—The Queen may grant a writ of protection from arrest to any person, which will avail for a year and a day;⁽³⁾ though it is not likely such a writ would be granted except under extraordinary circumstances.

(b) *When, where, and how arrest made.*]—The arrest is made in precisely the same manner as under a *ca. sa.*⁽⁴⁾ If the defendant is already in the sheriff's custody, he is considered to remain in custody under all the writs in the sheriff's hands, unless the arrest was made under a void writ.⁽⁵⁾

Delivering copy of capias to the defendant.]—Immediately on arrest, the sheriff is bound to deliver a copy of the *capias* to each defendant;⁽⁶⁾ or, if the defendant is already in the sheriff's hands, he must also be served with a copy of the *capias*. Where the arrest took place at 9 a. m., service of this copy at 7 p. m. of the same day was held too late,⁽⁷⁾ and the defendant was held entitled to be discharged and the bail-bond cancelled. The copy must be exact, for any material variance will be fatal;⁽⁸⁾ thus where the date is omitted,⁽⁹⁾ or where "Sheriffs of Middlesex" is put for *sheriff*.⁽¹⁰⁾ But where Mortlake was written for Mortlock, the variance was held immaterial.⁽¹¹⁾ Though an amended copy was not allowed to be served in some cases,⁽¹²⁾ it seems an amendment may now be applied for under the Common Law Procedure Acts, 1852 and 1854. Advantage must be taken of

⁽¹⁾ *Gibbons v. Alison*, 3 C. B. 181.

⁽²⁾ *Daniels v. Fielding*, 16 M. & W. 200.

⁽³⁾ Finch L. 454; *Borrodale v. Cutts*, 3 Lev. 332.

⁽⁴⁾ See *ante*, p. 596. For the fees of the sheriff relating to the arrest, see the end of chap. XVI.

⁽⁵⁾ *Hooper v. Lane*, 10 Q. B. 546; *Ex parte Egginton*, 23 L. J. 41 M. C.; 2 E. & B. 717.

⁽⁶⁾ 1 & 2 Vict. c. 110, s. 4; 2 Will. 4, c. 39, s. 4. *Copley v. Medeiros*, 2 D. & L. 74; 8 Scott, N. R. 172.

⁽⁷⁾ *Shearman v. Knight*, 5 Dowl. 572.

⁽⁸⁾ *Copley v. Medeiros*, 2 D. & L. 74; *Rennie v. Bruce*, *ibid.* 948.

⁽⁹⁾ *Perring v. Turner*, 3 Dowl. 15; *Smart v. Johnson*, 6 Dowl. 90; *Sugars v. Concannon*, 7 Dowl. 891; 5 M. & W. 30.

⁽¹⁰⁾ *Moore v. Morgan*, 16 M. & W. 95.

⁽¹¹⁾ *Macdonald v. Mortlock*, 2 D. & L. 963.

⁽¹²⁾ *Rennie v. Bruce*, 2 D. & L. 948; *Moore v. Morgan*, 16 M. & W. 95; 4 D. & L. 267.

Indorsement on capias of day of arrest.—“The sheriff, or other officer, to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at least after the execution thereof, indorse on such writ the true day of the execution thereof.”⁽³⁾

C. D. was arrested by me, S. O., by virtue of this writ, on the
day of , 18 S. O.

- (1) *Edwards v. Collins*, 5 Dowl. 227.
- (2) *Sugars v. Concannen*, 5 M. & W. 30; 7 Dowl. 891.
- (3) Rule Pr. 81, H. T. 1853; 2 Will. 4, c. 39, s. 4.
- (4) *Stevens v. Jackson*, 6 Taunt. 206; 1 Marsh. 469; *Baker v. Davenport*, 8 D. & R. 608; *Houlditch v. Birch*, 4 Taunt. 608.
- (5) If the defendant is ill and cannot be removed, see *ante*, p. 599.
- (6) *Silk v. Humphrey*, 4 A. & E. 967.
- (7) *Gordon v. Laurie*, 9 Q. B. 60; 32 Geo. 2, c. 28, ss. 2, 12.
- (8) *Dewhurst v. Pearson*, 1 Dowl. 664; 1 Cr. & M. 365; *Simpson v. Renton*, 5 B. & Ad. 35; *Gordan v. Laurie*, 9 Q. B. 60.
- (9) *Barsham v. Bullock*, 10 A. & E. 23.

sheriff may take the defendant to gaol, though this is not generally done until the eighth day, being the last day for putting in bail.⁽¹⁾

Sheriff's fees upon the arrest.—The fees payable to the sheriff on the arrest will be stated at the end of the next chapter.

Remaining in custody.—The defendant, when arrested, “shall remain in custody until he shall have given a bail-bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, together with 10*l.* for costs, according to the present practice of the superior courts.”⁽²⁾

⁽¹⁾ See *Planch v. Anderson*, 5 T. R. 37; *Williams v. Mostyn*, 4 M. & W. 145; 7 Dowl. 38.

⁽²⁾ 1 & 2 Vict. c. 110, s. 4.

CHAPTER XVI.

BAIL—PROCEEDINGS AFTER THE ARREST.

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|---|--|
| 1. Discharge of defendant on application to a judge.
2. Discharge by giving a bail-bond to sheriff.
3. Discharge by a deposit with sheriff in lieu of bail-bond.
4. Discharge by consent of plaintiff or sheriff.
5. Escape—Rescue. | 6. Proceedings after the discharge, &c.
(a) Action against the bail on bail-bond.
(b) Compelling sheriff to put in bail, &c.
(c) Setting aside and staying proceedings.
7. Sheriff's fees. |
|---|--|

 1. *Discharge of Defendant on Application to a Judge.*

In what cases.]—If the defendant is privileged on any of the grounds mentioned *ante*, p. 782, at the time of his arrest, or if the privilege accrues to him after arrest, as by becoming a peer, he is entitled at any stage of the action to make an application to a judge, or the court, for his discharge or other relief.⁽¹⁾ But if the privilege is doubtful, the defendant will not be discharged, but he will be left to sue out a writ of privilege, when he may plead it in abatement.⁽²⁾ The defendant will be discharged if he has been arrested without any affidavit to hold to bail previously made, or where such affidavit is not filed with the proper officer,⁽³⁾ or where it is

⁽¹⁾ *Trinder v. Shirley*, 1 Dong. 45. See *Phillips v. Wellesley*, 1 Dowl. 9.

⁽²⁾ As to which, see "Tidd's Pr. Forms;" *Luntley v. Battine*, 2 B. & Ald. 234. See, as to privilege, when committed by County Court for contempt, *Ex parte Dakins*, 16 C. B. 77.

⁽³⁾ *Hussey v. Baskerville*, 2 Wils. 225; but see *Knowles v. Stevens*, 1 C. M. & R. 26.

defective in not stating a cause of action or a ground of absconding,⁽¹⁾ or where it varies from the declaration as to the cause of action,⁽²⁾ or is otherwise defective,⁽³⁾ or where, after making the affidavit, and before the arrest, the plaintiff received part of the debt, and the balance was under 20*l.*;⁽⁴⁾ but giving a bail-bond without being arrested is a waiver of any objection to the affidavit,⁽⁵⁾ and so is a request of plaintiff to accept particular persons as bail.⁽⁶⁾ So he may be discharged where there are material irregularities in the writ of *capias*.⁽⁷⁾ Where the defendant had not been served with a copy of the writ of summons, the court granted a rule to show cause why he should not be discharged in four days unless served with such copy.⁽⁸⁾ And where the plaintiff does not declare in time, the defendant is not entitled to be discharged, but he may have judgment of *non pros*.⁽⁹⁾

When and how.—“It shall be lawful for any person arrested upon writ of *capias* to apply, at any time after such arrest, to a judge of one of the superior courts at Westminster, or to the court in which the action shall have been commenced, for an order or rule on the plaintiff in such action to show cause why the person arrested should not be discharged out of custody, and it shall be lawful for such judge or court to make absolute or discharge such order or rule, and to direct the costs of the application to be paid by either party, or to make such other order herein as to such judge or court shall seem fit, provided that any such order made by a judge may be discharged or varied by the court on application made thereto by either party dissatisfied with such order.”⁽¹⁰⁾ Where the application for discharge is made on the ground of an irregularity, it should be made promptly, *i. e.*, in general before the time for putting in bail has expired,⁽¹¹⁾ or at all events before the bail is perfected,⁽¹²⁾ or

(1) *Bateman v. Dunn*, 7 Dowl. 105; *Graham v. Sandrinelli*, 16 M. & W. 191.

(2) *Naylor v. Eager*, 2 Y. & J. 90; see *Green v. Elgie*, 3 B. & Ad. 437.

(3) *Brackenbury v. Needham*, 1 Dowl. 439.

(4) *Shore v. Cunningham*, 1 Dowl. 662.

(5) *Norton v. Danvers*, 7 T. R. 375.

(6) *Mammatt v. Matthew*, 2 Dowl. 797; 4 M. & Sc. 356.

(7) See *ante*, p. 787.

(8) *Brook v. Snell*, 8 Dowl. 371.

(9) *Turner v. Parker*, 2 D. & L. 444.

(10) 1 & 2 Vict. c. 110, s. 6.

(11) *Fownes v. Stokes*, 4 Dowl. 125; *Tucker v. Colegate*, 1 Dowl. 574; 2 C. & J. 489; *Firley v. Rallett*, 2 Dowl. 208.

(12) *Jones v. Price*, 1 East, 81.

put in,⁽¹⁾ or before obtaining time to put in bail,⁽²⁾ or before paying money into court in lieu thereof;⁽³⁾ but if the affidavit is a nullity, as where it is sworn before a person having no authority to take it,⁽⁴⁾ or where it is substantially bad,⁽⁵⁾ or untrue as to the intention to abscond, the application may be made at any time during the action.⁽⁶⁾

Form of application.—If the order has been irregularly obtained, the application should be to set aside the order and writ.⁽⁷⁾ Where materials are brought before the judge or a court which were not before the judge who made the order to arrest, the application should be to discharge the defendant and deliver up the bail-bond to be cancelled, and for the money deposited to be returned, as the case may be.⁽⁸⁾ So if the ground is, that the affidavit is defective.⁽⁹⁾

Affidavit on application.—Upon an application to the court to rescind a judge's order to hold to bail, no other affidavit can, in general, be used than those which were before the judge when he made the order. Thus, the defendant cannot produce affidavits to show that the plaintiff has no cause of action, or defendant did not intend to leave the country; but, on an application to discharge the defendant out of custody, fresh affidavits may be served, even though there has been an unsuccessful application to a judge at chambers.⁽¹⁰⁾ Where the ground of application is that defendant did not intend to abscond, he should in his affidavit distinctly set forth facts which negative such intention, and not merely deny it generally.⁽¹¹⁾ Where the plaintiff's affidavit

(1) *D'Argent v. Vivant*, 1 East, 330; *Reeves v. Hudker*, 2 C. & J. 44; 2 Tyr. 161.

(2) *Moore v. Stockwell*, 6 B. & C. 769; 9 D. & R. 124; *Holliday v. Lawes*, 3 Bing. N. C. 541.

(3) *Green v. Glasbrooke*, 1 Bing. N. C. 516; 1 Sc. 402.

(4) *Sharpe v. Johnson*, 2 Bing. N. C. 246; 2 Sc. 405; 4 Dowl. 354.

(5) *Morgan v. Baylis*, 3 Dowl. 117.

(6) *Walker v. Lamb*, 9 Dowl. 131; but see *Sugars v. Concannen*, 7 Dowl. 891; 5 M. & W. 30.

(7) *Hopkins v. Salembier*, 7 Dowl. 493; 5 M. & W. 423. See *Bullock v. Jenkins*, 1 L. M. & P. 645.

(8) *Ibid.*; *Burness v. Guiranovich*, 4 Exch. 520; *Pegler v. Hislop*, 1 Exch. 437.

(9) *Gadsder v. McLean*, 9 C. B. 283.

(10) *Bullock v. Jenkins*, 1 L. M. & P. 645.

(11) *Walker v. Lamb*, 9 Dowl. 124; *Robinson v. Gardner*, 7 Dowl. 716.

was that defendant's regiment was under orders to embark for India, and the affidavit in application for discharge only stated that an army agent informed the deponent that the regiment was not under orders, but was in India, it was held insufficient to rebut the *prima facie* case of the plaintiff.⁽¹⁾ Where the ground of application is that there is no cause of action, the court must be clearly satisfied by affidavit that there is no such cause.⁽²⁾ But it seems where the point involved would require the judge to decide the real merits of the case which a jury only could properly do, he will not receive affidavits contradicting the affidavit to hold to bail as to the cause of action.⁽³⁾ Where the defendant on affidavit denied the debt, and produced a letter from the plaintiff, written shortly before the affidavit to hold to bail, stating defendant to be a creditor of his,, and the plaintiff did not deny writing the letter, or allege that the debt had subsequently accrued, the defendant was discharged.⁽⁴⁾ So, where the defendant showed that one of the parties to whom the debt was due was alive, instead of being dead, as represented by the affidavit to hold to bail.⁽⁵⁾ Where the debt is clearly barred by the Statute of Limitations, a judge has discharged the defendant.⁽⁶⁾ But the court has refused to discharge the defendant where the consideration was a gambling debt,⁽⁷⁾ or where the arrest was against good faith,⁽⁸⁾ or where the plaintiff in a subsequent affidavit had made statements inconsistent with the affidavit to hold to bail.⁽⁹⁾ Where a judge at chambers is applied to for defendant's discharge, it seems some new materials must be submitted, for on the same state of facts one judge could not discharge a defendant, another judge having made an order to arrest him.⁽¹⁰⁾ Where he has refused the application to discharge, the

(1) *Askenheim v. Colegrave*, 13 M. & W. 620.

(2) *Pegler v. Hislop*, 1 Exch. 437; 5 D. & L. 223; *Bullock v. Jenkins*, 1 L. M. & P. 645; *Austin v. Mills*, 8 Exch. 723; *Graham v. Sandrinelli*, 16 M. & W. 191, 197.

(3) *Copeland v. Child*, 1 Bail. C. C. 176; but see the cases in the previous note.

(4) *Nizetitch v. Bonacich*, 5 B. & Ald. 904.

(5) *Morrell v. Parker*, 6 Dowl. 123; 3 M. & W. 65. See also *Burton v. Haworth*, 4 B. & Ald. 462; 1 N. & M. 318; *Mason v. Smith*, 5 Dowl. 179; *Isaacs v. Silver*, 11 Moore, 348; *McClure v. Pringle*, 13 Price, 8; 6 D. & R. 24.

(6) Per Parke B. *Pegler v. Hislop*, 1 Exch. 437.

(7) *Curzon v. Hodges*, 5 Dowl. 98.

(8) *Udall v. Nelson*, 3 A. & E. 215; 6 N. & M. 637.

(9) *Vaughan v. Goadby*, 6 Dowl. 96; 3 M. & W. 143.

(10) *Graham v. Sandrinelli*, 16 M. & W. 191.

affidavits used before him should also be brought before the court,⁽¹⁾ and affidavits may be used in denial of the plaintiff's cause of action,⁽²⁾ and, in general, all the objections should be brought before the judge at chambers, else the court will not on appeal entertain them.⁽³⁾

Affidavits in answer.—If the affidavit used by defendant on his application for discharge deny his intention to abscond, it seems the plaintiff may make an affidavit in answer as to that point.⁽⁴⁾

Costs of application to discharge.—The costs of the application are in the discretion of the judge or court.⁽⁵⁾ Where the plaintiff has acted harshly, the court may give the defendant his costs. But where the discharge is ordered merely on the ground of some defect in the affidavit, not implying any concealment on the part of the plaintiff, he will not be ordered to pay the costs.⁽⁶⁾ If the court give no direction as to costs, the defendant's costs are not costs in the cause.⁽⁷⁾ Where the court thought the arrest premature and cancelled the bail-bond, but allowed the order and *capias* to stand, they expressly ordered the defendant's costs to be costs in the cause.⁽⁸⁾

2. Discharge by giving a Bail-bond to the Sheriff.

Where the defendant is not entitled to his discharge on application to a judge, he must remain in custody "until he shall have given a bail-bond to the sheriff, or shall have made a deposit of the sum indorsed on such writ of *capias*, together with 10*l.* for costs, according to the present practice of the said superior courts."⁽⁹⁾

Bail-bond.—The sheriff, on being furnished with the names of sufficient sureties, and satisfying himself of their

(1) *Heath v. Nesbitt*, 11 M. & W. 669; 2 Dowl. N. S. 1041; *Needham v. Bristowe*, 4 M. & G. 262; 4 Sc. N. R. 773.

(2) *Pegler v. Hislop*, 1 Exch. 437.

(3) *Flight v. Cooke*, 1 D. & L. 714.

(4) *Graham v. Sandrinelli*, 16 M. & W. 191; *Gibbons v. Spalding*, 2 Dowl. N. S. 746; 11 M. & W. 174.

(5) 1 & 2 Vict. c. 110, s. 6.

(6) *Graham v. Sandrinelli*, 16 M. & W. 191.

(7) *Mummery v. Campbell*, 2 Dowl. 798; 4 M. & Sc. 379.

(8) *Pegler v. Hislop*, 1 Exch. 437.

(9) 1 & 2 Vict. c. 110, s. 5.

sufficiency, prepares a bail-bond to be executed by them and the defendant, and on its execution he is bound to discharge the defendant, if not liable to be detained on other grounds. The sheriff is entitled to be paid by the defendant the expense of preparing the bail-bond.⁽¹⁾ If he refuses, without cause, to accept a bail-bond, he is liable to an action.⁽²⁾ Each surety must be worth the sum in the penalty,⁽³⁾ his property being within the county.⁽⁴⁾ The sheriff may take a bail-bond without arresting the defendant.⁽⁵⁾ The bail-bond must be executed on or before the eighth day limited for putting in bail,⁽⁶⁾ and before execution the condition must have been filled up,⁽⁷⁾ otherwise the bond will be void. The number of sureties is immaterial,⁽⁸⁾ though more than one are generally taken for safety.⁽⁹⁾ If the sureties be insufficient, the sheriff is not liable to the plaintiff on that ground, for the plaintiff need not accept the assignment of the bond.⁽¹⁰⁾ The sheriff, in practice, takes the bail for double the amount indorsed on the writ.⁽¹¹⁾ If the bond is given for a greater sum than that indorsed on the writ, the court will set it aside.⁽¹²⁾ The bail must satisfy the whole debt due to the plaintiff, though exceeding the sum sworn to and costs.⁽¹³⁾

The bond must be given, not to the bailiff, but to the sheriff himself, and designating him by the addition of his name of office, otherwise it is void.⁽¹⁴⁾ It requires no stamp.⁽¹⁵⁾ The condition is for the defendant putting in special bail.⁽¹⁶⁾ If the defendant has been arrested by a

(1) *Milne v. Wood*, 5 C. & P. 587. For the sheriff's fees relating to the bail-bonds, see the end of this volume.

(2) 2 Saund. 61, b, c.

(3) *Matson v. Booth*, 5 M. & Sel. 223.

(4) *Lovell v. Plomer*, 15 East, 320.

(5) *Taylor v. Clow*, 1 B. & Ald. 223.

(6) *Ibid.*; *Pullein v. Benson*, 1 Lord Raym. 352; *Thompson v. Rock*, 4 M. & Sel. 338.

(7) *Powell v. Duff*, 3 Camp. 181.

(8) *Beaufage's case*, 10 Co. 101 a.; 2 Saund. 61 c.; *Peppin v. Cooper*, 2 B. & Ald. 440; *Matson v. Booth*, 5 M. & Sel. 223.

(9) *Lazarus v. Tanner*, 9 Moore, 422; 2 Bing. 227; *Lane v. Griffiths*, 7 Dowl. 313.

(10) 2 Saund. 61 c.

(11) See 12 Geo. 1, c. 23, s. 2; *Watson's Sheriff*, 154; *Cook v. Cooper*, 7 A. & E. 605.

(12) *Cook v. Cooper*, 7 A. & E. 605; 2 N. & P. 607.

(13) 2 Saund. 61 a.; *Stevenson v. Cameron*, 8 T. R. 29.

(14) *Beaufage's case*, 10 Co. 101; *Lewis v. Knight*, 8 Bing. 271; 1 M. & Sc. 353; 1 Dowl. 261; *Rogers v. Reeves*, 1 T. R. 418.

(15) 5 Geo. 4, c. 41.

(16) 1 & 2 Vict. c. 110, s. 3 and sch.

wrong name, he should execute the bond in his right name, stating that he was arrested in a wrong name, otherwise he may be held to waive the irregularity.⁽¹⁾

Form of Bail-bond.

Know all men by these presents, that we, C. D., of , E. F., of , and G. H., of , are held and firmly bound to S. S., Esquire, sheriff of the county of , in the sum of , [*double the sum indorsed on writ*] of lawful money of Great Britain, to be paid to the said sheriff or his certain attorney, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, and each of us for himself, in the whole, our and every of our heirs, executors, and administrators firmly, by these presents, sealed with our seals. Dated the day of , in the year of our Lord 185 .

Whereas, the above bounden C. D., was on the day of taken by the said sheriff, in the bailiwick of the said sheriff, by virtue of the Queen's writ of *capias*, issued out of Her Majesty's Court of , bearing date, at Westminster, the day of , to the said sheriff, directed and delivered against the said C. D., in an action at the suit of A. B. And whereas a copy of the said writ, together with every memorandum or notice subscribed thereto, and all indorsements thereon was on the execution thereof delivered to the said C. D. And whereas he is by the said writ required to cause special bail to be put for him in the said court to the said action, within eight days after execution thereof on him, inclusive of the day of such execution. Now the condition of this obligation is such, that if the said C. D. do cause special bail to be put in for him to the said action, in Her Majesty's said court, as required by the said writ, then this obligation to be void and of no force, otherwise to stand and remain in full force, vigour, and effect.

Sealed and delivered in the presence	C. D. (L. S.)
of	E. F. (L. S.)
	G. H. (L. S.)

3. Discharge by a Deposit with Sheriff in lieu of Bail-bond.

Instead of giving a bail-bond, the defendant may be discharged, if he deposit with the sheriff the sum indorsed on the writ of *capias*, together with 10*l.* costs;⁽²⁾ and money paid on an arrest will be presumed to be paid for this purpose, unless the defendant has got an acknowledgment for the same.⁽³⁾ The sheriff is bound to pay these moneys into

⁽¹⁾ See *ante*, p. 774.

⁽²⁾ 1 & 2 Vict. c. 110, s. 4; 43 Geo. 3, c. 46, s. 2.

⁽³⁾ *Wain v. Bradbury*, 1 Smith, 127.

court, and if the defendant, within the eight days required by the *capias*, put in and perfect bail, he is entitled to be repaid such sum on motion.⁽¹⁾ To entitle the defendant to get back the money, he need not have entered appearance to the writ of summons,⁽²⁾ nor even have put in bail if he render himself,⁽³⁾ nor even have put in bail in due time if, in his affidavit, he deny the debt and allege merits.⁽⁴⁾ Where the deposit has been made by a third person, the latter will be entitled, in like manner, to have it returned.⁽⁵⁾ Where, after depositing, the defendant obtained a summons for better particulars, with a stay of proceedings, which was unobeyed for a year, the court refused to return the money.⁽⁶⁾ The sheriff is entitled to a fee of 6s. 8d. or 10s. (according as the arrest is in London or Middlesex, or in any other county), for receiving and paying the money into court.⁽⁷⁾ The application must be made to the court, and not to a judge at chambers,⁽⁸⁾ and should be for a rule to show cause why the defendant should not be at liberty to take out of court the sum of £ , deposited by him with the sheriff in lieu of bail, bail above having since been duly perfected [or, the defendant having since been duly rendered in discharge of his bail in this action.] There must be an affidavit.

Form of Affidavit for Defendant's Application.

[*Title of court and cause.*]

I, D. A., of , attorney in this cause for the above-named [defendant] make oath and say :

1. That the [said] defendant was arrested on or about the . by an officer of the sheriff of , at the suit of the above-named plaintiff, by virtue of a writ of *capias*, dated the , issuing out of this honourable court, and which writ was indorsed for bail for £ , by the order of the Honourable Mr. , dated , and that the said defendant thereupon in lieu of giving bail to the said sheriff, deposited with the sheriff's officer aforesaid the sum of £ ,

(1) 43 Geo. 3, c. 46, s. 2.

(2) *Brook v. Gunning*, 8 Dowl. 11; 8 Sc. 343.

(3) *Ibid.*; *Harford v. Harris*, 4 Taunt. 669; *Chadwick v. Batty*, 3 M. & Sel. 283.

(4) *Brook v. Brook*, 1 Bail C. C. 120.

(5) *Nunn v. Powell*, 1 Smith, R. 13. See *Douglas v. Stanbrough*, 3 A. & E. 316.

(6) *Harden v. Harbourn*, 7 Dowl. 546.

(7) See the table of sheriff's fees in the appendix.

(8) *Geach v. Coppin*, 3 Dowl. 74.

being the sum indorsed on the said writ, together with the sum of ten pounds to answer costs.

2. That the said several sums have been paid into the hands of the proper officer of this honourable court.

3. That bail above has since been duly put in in this action for the said defendant, and duly perfected [or, that the said defendant has been duly rendered in discharge of his bail in this action at the suit of the above-named plaintiff.]

Sworn, &c.

D. A.

If the defendant fails to put in and perfect bail in due time, the *plaintiff may apply* to the court (not to a judge) *for the money* to be paid over to him, such payment being subject to such deductions, if any, from the sum of 10*l.* deposited and paid to answer the costs as aforesaid, as upon the taxation of the plaintiff's costs, as well of the suit as of his application to the court in that behalf may be found reasonable.⁽¹⁾ The application cannot be made till the time for perfecting special bail has expired; ⁽²⁾ but where the defendant does not perfect bail in time and makes no affidavit of merits, the plaintiff may apply, notwithstanding the defendant afterwards render; ⁽³⁾ though, if bail has been perfected, not in due time, but before the money is paid out, the court will put the plaintiff to elect which security he will have.⁽⁴⁾ The court will, on an affidavit of merits, extend the time for perfecting bail.⁽⁵⁾ Where, after the time for perfecting bail, the defendant paid an additional 10*l.* into court, under 7 & 8 Geo. 4, c. 71, s. 2, before the plaintiff applied, the court refused to pay out; ⁽⁶⁾ but where the plaintiff has got out the money before the additional 10*l.*, in lieu of special bail, has been paid in, the court will not order him to refund on the ground that, owing to the sheriff's default, the 10*l.* could not be paid sooner.⁽⁷⁾ Where the defendant, having been arrested in a wrong name, paid the debt and 10*l.* costs, without prejudice, but omitted to perfect bail, the court refused to pay out.⁽⁸⁾

The application must be made on an affidavit, which is

⁽¹⁾ 43 Geo. 3, c. 46, s. 2.

⁽²⁾ *Ross v. Softly*, 6 Bing. 634; 4 M. & P. 464; *Stamford v. McCann*, 2 C. M. & R. 632; *Straford v. Love*, 3 Dowl. 593.

⁽³⁾ *Newman v. Hodgson*, 2 B. & Ad. 422.

⁽⁴⁾ *Geach v. Coppin*, 3 Dowl. 74.

⁽⁵⁾ *Parker v. Turner*, 2 Chitt. R. 71; *Geach v. Coppin*, 3 Dowl. 74.

⁽⁶⁾ *Scherwinski v. Peronnet*, 8 Dowl. 229; 6 M. & W. 90.

⁽⁷⁾ *Hannah v. Willis*, 6 Dowl. 417; 4 Bing. N. C. 311.

⁽⁸⁾ *Gadly v. Parsons*, 5 Taunt. 623.

the same as that made on the defendant's application, ante, 798, down to—

3. And I further say, that bail above has not been put in in this action for the said defendant [or, that bail above has been put in in this action for the said defendant, but has not been perfected], nor has a sum of 10*l.*, in addition to the said sum of £ and £ , been paid into the hands of the proper officer of this honourable court, under the statute in that case made and provided.

The rule must be served on the defendant, and a motion is afterwards made, on affidavit of service, to make the rule absolute. If the residence of the defendant is unknown, or he has gone abroad, the rule may be stuck up in the Master's office, by leave of the court or a judge.⁽¹⁾

4. *Discharge by consent of Plaintiff or Sheriff.*

The defendant or his attorney may give an undertaking to the plaintiff to put in bail, either by way of a bond,⁽²⁾ or of a simple undertaking, in which case the court will enforce it by attachment,⁽³⁾ as in other cases. Such undertaking must, however, be given, not to the sheriff, but to the plaintiff or his attorney,⁽⁴⁾ and, if by a third person, need not be in writing, within the Statute of Frauds.⁽⁵⁾

If the sheriff dispense with taking a bail-bond, or a deposit, he is liable to an action, though not until the eight days have elapsed for putting in bail, unless actual damage is expressly alleged to have accrued.⁽⁶⁾ And if the sheriff permit the defendant to go at large on his promise to pay the debt, and the sheriff is obliged to pay it himself, he cannot recover the amount afterwards from the defendant by action.⁽⁷⁾ The sheriff must discharge the defendant on receiving authority from the plaintiff to that effect, though the attorney may lose his lien thereby.⁽⁸⁾ So, if a third party pay

⁽¹⁾ Rule P. 162, H. T. 1853. See *Hunt v. McLachlan*, 7 Dowl. 708; *Shackel v. Johnson*, 7 C. B. 865.

⁽²⁾ *Hall v. Carter*, 2 Mod. 304; *Pasterne v. Hanson*, 2 Saund. 60.

⁽³⁾ *Ibid.*; *Rogers v. Reeves*, 1 T. R. 418, 422.

⁽⁴⁾ *Sedgworth v. Spicer*, 4 East, 568; *Lewis v. Knight*, 8 Bing. 271; 1 Dowl. 261; 1 M. & Sc. 353.

⁽⁵⁾ *Jarmain v. Algar*, 3 C. & P. 249.

⁽⁶⁾ *Randell v. Wheble*, 10 A. & E. 719.

⁽⁷⁾ *Pitcher v. Bailey*, 8 East, 171.

⁽⁸⁾ *Martin v. Francis*, 2 B. & Ald. 402; *Hookham v. Monkton*, 6 Moore, 497.

the debt and costs to the plaintiff.⁽¹⁾ But the sheriff may, in such cases, detain the defendant a reasonable time to see if any detainers are entered against him.⁽²⁾

5. *Escape or Rescue of Defendant.*

If the defendant escape, and the escape be voluntary, i. e. with consent of the sheriff, the sheriff cannot retake him, unless, perhaps, on the same day.⁽³⁾ If the escape be negligent, i. e. without the sheriff's consent, see *ante*, p. 598.

Rescue.]—If, before the defendant is taken to prison, he is rescued from the custody of the bailiff, the sheriff may make a return, stating the rescue, which is a good excuse.⁽⁴⁾ But a rescue, after having been taken to prison, is no excuse.⁽⁵⁾ The rescuers, in such a case, may be attached for contempt,⁽⁶⁾ or may be indicted, or are subject to an action on the case brought by the plaintiff. The court have permitted a party who has been returned as a rescuer to show, by affidavit in mitigation of punishment, that there had been no legal arrest.⁽⁷⁾

6. *Proceedings after the Discharge.*

If the defendant do not give bail, nor obtain his discharge in any of the ways mentioned, he remains in prison until final judgment. If he has been discharged by the sheriff without giving a bail-bond or deposit, and bail is not put in or perfected, or the defendant rendered, the plaintiff may either bring an action for the escape against the sheriff or apply for an attachment against him, after ruling him to return the writ and bring in the body. But if, as is generally the case, he gives a bail-bond to the sheriff, which contains the usual condition to put in special bail in eight days, and this is not done, the bond is forfeited, and the

⁽¹⁾ *Rimmer v. Turner*, 3 Dowl. 601.

⁽²⁾ *Taylor v. Brander*, 1 Esp. 45.

⁽³⁾ *Hodgson v. Mee*, 3 A. & E. 765; 5 N. & M. 302.

⁽⁴⁾ *Howden v. Standish*, 6 C. B. 504.

⁽⁵⁾ *O'Neil v. Marson*, 5 Burr. 2812; *Fermor v. Phillips*, 5 Moore, 184; 3 B. & B. 27.

⁽⁶⁾ *Sheather v. Holt*, 1 Str. 531; *Gobby v. Dewes*, 10 Bing. 112; *White v. Chapple*, 4 C. B. 628.

⁽⁷⁾ *R. v. Minify*, 1 Str. 642.

plaintiff has his option of proceeding either against the sheriff or against the bail. If the bail given to the sheriff be substantial and sufficient, the plaintiff may obtain an assignment of the bail-bond, and bring an action thereon against such bail for the amount sought to be recovered. But if he prefers proceeding against the sheriff, then he must rule the sheriff to return the writ and to put in and perfect special bail, or to put in bail and render the defendant, and if this is not done, the plaintiff may apply for an attachment against the sheriff. The plaintiff, however, cannot take both these courses, but must elect one or other, for, after serving the sheriff with a rule of allowance of bail, or suing out an attachment, the plaintiff cannot take an assignment of the bond and sue thereon.⁽¹⁾

(a) *Action against the Bail on the Bail-bond.*

Assignment of bail-bond.]—Where the defendant has given a bail-bond, and the plaintiff considers his best course to be to proceed against the bail, he applies to the sheriff for an assignment of the bail-bond, and the sheriff is bound by statute so to assign, which he does by indorsing the bail-bond in the presence of two witnesses, thus :⁽²⁾

Form of Assignment of Bail-bond.

I, the within-named sheriff of _____, have, at the request of A. B. the within-named plaintiff, assigned to him, the said A. B., the bail-bond within written, and all benefit and advantage arising therefrom, pursuant to the statute in that case made and provided. In witness whereof I have hereunto set my hand and seal of office this _____ day of _____, 18 ____.

Signed, sealed and delivered by the within- } S. L. Sheriff, (L. S.)
named sheriff in the presence of }
W. A.
W. B.

The plaintiff must not be a witness ; ⁽³⁾ and the witnesses need not both sign their names at the time of the execution.⁽⁴⁾ The assignment need not be stamped.⁽⁵⁾ If the

(1) See post, p. 803, *et seq.*

(2) 4 Anne, c. 16, s. 20.

(3) *White v. Barrack*, 1 M. & W. 424 ; 1 Tyr. & Gr. 764.

(4) *Phillips v. Barlow*, 6 C. & P. 781 ; 1 Sc. 322 ; 1 Bing. N. C. 433.

(5) 5 Geo. 4, c. 41.

sheriff refuse to assign, an action on the case lies against him.⁽¹⁾ Where two bail-bonds have been taken, two writs having been sued out into separate counties, the plaintiff may proceed upon the first.⁽²⁾ The plaintiff cannot compel an assignment after service of the rule of allowance of bail,⁽³⁾ or after suing out an attachment against the sheriff,⁽⁴⁾ though the plaintiff may abandon the attachment and take the assignment.⁽⁵⁾ Nor can the plaintiff compel an assignment after ruling the sheriff to bring in the body until that rule has expired;⁽⁶⁾ nor after giving time to the defendant without the consent of the bail.⁽⁷⁾ But he is entitled to the assignment though the defendant has rendered, provided he has not duly put in special bail; for a surrender does not vacate the bond.⁽⁸⁾ The assignment must be made before the plaintiff is out of court for not declaring,⁽⁹⁾ though he may sue on the bond after that time.⁽¹⁰⁾ The assignment may be made before forfeiture,⁽¹¹⁾ though the action on the bond must be afterwards.⁽¹²⁾

The assignment is obtained by application at the sheriff's office, Red Lion-square, for Middlesex, at the Secondary's office, Basinghall-street, for London, or at the office of the town agent of the sheriff for other counties respectively. The under-sheriff is presumed to have authority to make the assignment,⁽¹³⁾ or even his clerk, in the name of the sheriff.⁽¹⁴⁾ The assignment of the bail-bond discharges the sheriff, but does not prevent the plaintiff going on with the original action;⁽¹⁵⁾ nor does it prevent him excepting to the bail when the bail to the sheriff become bail to the action.⁽¹⁶⁾

(1) *Stamper v. Melbourne*, 7 T. R. 122.

(2) *Bullock v. Morris*, 2 Taunt. 67; *Powell v. Henderson*, 1 Chitt. Rep. 392.

(3) *Murray v. Durand*, 1 Esp. 87; *How v. Lacy*, 1 Taunt. 119.

(4) Tidd, 300.

(5) *Pople v. Wyatt*, 15 East, 215.

(6) *Whittle v. Oldaker*, 7 B. & C. 480.

(7) *Farmer v. Thorley*, 4 B. & Ald. 91.

(8) *Rodgson v. Mee*, 3 A. & E. 765; 5 Nev. & M. 302.

(9) *Sparrow v. Nayler*, 2 W. Bl. 876.

(10) *Pigotte v. Trust*, 3 B. & P. 221.

(11) *Paradice v. Holiday*, Barnes, 77; *Alsten v. Underhill*, 1 Cr. & M. 492. See *Dent v. Weston*, 8 T. R. 4.

(12) *Gregson v. Heather*, 2 Lord Raym. 1455; 2 Str. 727.

(13) *Wright v. Barrack*, 1 T. & Gr. 764.

(14) *Doe d. James v. Brown*, 5 B. & Ald. 245; Tidd, 164.

(15) *Ede v. Collingridge*, 11 M. & W. 61; 2 Dowl. N. S. 764; *Betts v. Smith*, 2 Q. B. 113; 1 G. & D. 284.

(16) Rule Pr. 86, H. T. 1853.

When action may be brought by plaintiff.—The plaintiff, after assignment by the sheriff, may sue on the bail-bond in his own name,⁽¹⁾ but not until the bail-bond is forfeited, i. e. where bail has not been put in within eight days after the *capias* has been executed,⁽²⁾ or not been duly justified after exception taken to the bail.⁽³⁾ The action may be brought after justification of bail, if the rule for allowance has not been served in time,⁽⁴⁾ and even after a surrender, and after the expiration of eight days from the arrest, if special bail be not put in,⁽⁵⁾ but not after bail have been put in who cannot be bail, for this cannot be treated as a nullity.⁽⁶⁾ Nor will the action be allowed after gross delay in resorting to this remedy, for the proceedings will be set aside.⁽⁷⁾ Nor pending a rule to bring in the body of the defendant.⁽⁸⁾ Nor after giving time to the defendant as by taking a *cognovit*, unless the bail have consented to remain liable;⁽⁹⁾ but, in such a case, notice that the *cognovit* is unsatisfied must be first given.⁽¹⁰⁾ But time given to the defendant without the consent of bail will not discharge the latter, where the assignment has been taken after the forfeiture of the bond.⁽¹¹⁾

The action should be against all the bail jointly, or it may be against any of them severally.⁽¹²⁾

How.—The action is commenced by writ of summons in the usual manner against the bail, either jointly or severally, according to circumstances. The writ should not be issued before forfeiture has occurred. The action must be brought in the same court as that out of which the original writ issued. The venue may be laid in any county.⁽¹³⁾ The

⁽¹⁾ 4 Anne, c. 16, s. 20; *Barnes v. Keane*, 15 Q. B. 75.

⁽²⁾ *Hillary v. Rowles*, 5 B. & Ad. 460; *Hodgson v. Mee*, 3 A. & E. 765.

⁽³⁾ *Bond v. Evans*, 4 B. & C. 864; *Evans v. Bates*, 2 Cr. & M. 143.

⁽⁴⁾ *Ellis v. Bates*, 2 Cr. & M. 143; *Bignold v. Lee*, 1 B. & C. 285.

⁽⁵⁾ *Hodgson v. Mee*, 3 A. & E. 765.

⁽⁶⁾ *R. v. Sheriff of Surrey*, 2 East, 181.

⁽⁷⁾ *Surman v. Bruce*, 10 Bing. 434; 4 M. & Sc. 184.

⁽⁸⁾ Rule Pr. 87, H. T. 1853.

⁽⁹⁾ *Clift v. Gye*, 9 B. & C. 422; *Surman v. Bruce*, 10 Bing. 434; 4 M. & Sc. 184; 2 Dowl. 777.

⁽¹⁰⁾ *Ibid.*

⁽¹¹⁾ *Woosman v. Price*, 1 Cr. & M. 352.

⁽¹²⁾ *Knowles v. Johnson*, 2 Dowl. 653.

⁽¹³⁾ *Gregson v. Hether*, 2 Str. 727; 2 Lord Raym. 1455.

defendant cannot be held to bail in an action on a bail-bond,⁽¹⁾ though he may in an action upon the judgment, when obtained.⁽²⁾ Though the writ is not specially indorsed, if judgment go by default, final judgment may at once be entered up without any writ of inquiry,⁽³⁾ and execution levied for the debt and costs in the original action, if not exceeding the penalty, also for the costs of the action on the bond and four per cent. interest.

As to setting aside or staying proceedings, see *post*.

Action on bail-bond by the sheriff.]—The sheriff's officer who took the bail-bond may sue upon it in the name of the sheriff; and such action may be brought in any court.⁽⁴⁾

(b) *Compelling the sheriff to put in bail, &c.*]—If the plaintiff resolve not to take an assignment of the bail-bond, but to proceed against the sheriff, he should do so promptly, for the court will not in general interfere if the delay has put the sheriff in a worse situation;⁽⁵⁾ and yet inconveniences may ensue from proceeding too quickly, as where the time for putting in and perfecting bail has not expired.⁽⁶⁾

Rule to return writ—How and when.]—The first step, if bail has not been put in, or not put in in time, is to rule the sheriff to return the writ; or, if bail has been put in, but not justified, then the course is to except to the bail, and serve a notice of the exception before ruling the sheriff to return the writ. The mode of excepting is stated, *post*. The rule to return the writ is the same as that given, *ante*, p. 612, except as to the name of the writ therein mentioned. It is a four day rule on the Sheriffs of London and Middlesex, and upon other sheriffs it is an eight day rule.⁽⁷⁾ “No judge's order shall issue for the return of the writ; but a side-bar rule shall issue for that purpose in vacation as in term, which shall be of the same force and effect as side-bar

(1) *Brandon v. Robson*, 6 T. R. 336.

(2) *Prendergast v. Davis*, 8 T. R. 80; see also 450.

(3) *Moody v. Pheasant*, 2 B. & P. 446.

(4) Rule Pr. 83, H. T. 1853.

(5) *R. v. Sheriff of Surrey*, 9 East, 467; *Hobhouse v. Middleditch*, 2 Chitt. B. 58.

(6) *Hutchins v. Hird*, 5 T. R. 479; Tidd, 310.

(7) Rule Pr. 130, H. T. 1853.

rules made for that purpose in term.”⁽¹⁾ The rule may be obtained immediately after the execution of the writ of *capias*, or if not executed at the expiration of a calendar month from its date, or sooner if the court or a judge so order. The rule cannot, however, be made after the plaintiff has obtained an assignment of the bail-bond,⁽²⁾ unless such assignment is invalid;⁽³⁾ nor after accepting a *cognovit* or other security from the defendant without the sanction, express or implied, of the sheriff.⁽⁴⁾

Rule to bring in the body.—After the return of *cepi corpus*, if bail has not been put in or perfected in proper time, or the defendant has not surrendered, the next step is to rule the sheriff to bring in the body, or if bail have been put in, but not justified, notice of exception should be served, in order to compel a justification. This is a side-bar rule which issues in vacation as in term, and a judge's order in the former case is unnecessary.⁽⁵⁾ All such rules on the sheriff of London and Middlesex are four-day rules, and upon other sheriffs eight-day rules.⁽⁶⁾ “In case a rule for returning a writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a rule may thereupon issue requiring the sheriff or other officer, within the like number of days after the service of such rule, as by the practice of the court is prescribed with respect to rules to bring in the body issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action; and if the sheriff or other officer shall not duly obey such rule, an attachment shall issue in the following term for disobedience of such rule, whether the bail shall or shall not have been put in and perfected in the meantime.”⁽⁷⁾ And “where any sheriff, before his going out of office, shall arrest any defendant, and take a bail-bond, and make return of *cepi corpus*, he shall and may within the time allowed by law, be called upon to bring in the body by rule for that purpose, notwith-

⁽¹⁾ Rule Pr. 132, H. T. 1853.

⁽²⁾ *Hepworth v. Sanderson*, 1 M. & Sc. 64; *Ladd v. Arnabaldi*, 1 C. & J. 97.

⁽³⁾ *Brooke v. Stone*, 1 Wils. 223.

⁽⁴⁾ *R. v. Sheriff of Surrey*, 1 Taunt. 159; *Ruston v. Hatfield*, 3 B. & Ald. 204.

⁽⁵⁾ Rule Pr. 132, H. T. 1853.

⁽⁶⁾ Rule Pr. 130, H. T. 1853.

⁽⁷⁾ Rule Pr. 90, H. T. 1853.

standing he may be out of office before such rule shall be granted."⁽¹⁾

The rule should be issued promptly, otherwise an attachment for disobeying it will be refused;⁽²⁾ but it cannot issue earlier than the day on which the writ is returned, nor before the time has expired for putting in bail.⁽³⁾ Nor can the rule issue after judgment recovered against the sheriff in an action for an escape;⁽⁴⁾ nor after the defendant has been discharged by order of the plaintiff.⁽⁵⁾ The rule must be served within a reasonable time.⁽⁶⁾

Sheriff obeying rule.—The sheriff must, within the time limited by the rule, bring the defendant into court, or put in and perfect special bail; and it is not enough to render the defendant, or put in and perfect special bail afterwards, though before an attachment is moved for;⁽⁷⁾ nor is it any excuse that the plaintiff's proceedings are stayed by an injunction obtained by the defendant.⁽⁸⁾ "Whenever the plaintiff shall rule the sheriff on a return of *cepi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect bail at any time before the expiration of such rule; and a plaintiff having so ruled, the sheriff shall not proceed on any assignment of the bail-bond until the time has expired to bring in the body as aforesaid."⁽⁹⁾ The sheriff obeys the writ, not by bringing the defendant in person into court, but merely by showing that the defendant is in custody,⁽¹⁰⁾ or that bail have been put in, and he has rendered.⁽¹¹⁾ If the sheriff's officer has put in bail for the defendant, these may immediately take him and render him in their discharge,⁽¹²⁾ without justifying.⁽¹³⁾

(1) Rule Pr. 134, H. T. 1853.

(2) *R. v. Sheriff of Middlesex*, 1 Dowl. 53.

(3) *Pouches v. Levien*, 4 M. & Sel. 427; *Potter v. Marsden*, 8 East, 525; *Hutchins v. Hird*, 5 T. R. 479.

(4) *Borwick v. Walton*, 2 B. & Ald. 623; 1 Chitt. R. 393.

(5) *Hookham v. Monkton*, 6 Moore, 497.

(6) *R. v. Sheriff of Middlesex*, 1 Dowl. 53.

(7) Rule Pr. 90, H. T. 1853.

(8) *R. v. Sheriff of Middlesex*, 1 Dowl. 454.

(9) Rule Pr. 89, H. T. 1853.

(10) *Macleod v. Marsden*, Barnes, 32.

(11) *R. v. Sheriff of Middlesex*, 8 T. R. 464.

(12) *R. v. Butcher*, Peake, 169.

(13) *R. v. Sheriff of Middlesex*, 7 T. R. 527; *id.* 4 Dowl. 673.

Attachment for disobedience.—An attachment lies against the sheriff for disobedience, even though he has gone out of office before the rule to bring in the body is granted.⁽¹⁾ If the rule to bring in the body expire on a day in term, the attachment may be moved for next day,⁽²⁾ or if on the last day of term, then on that day at the rising of the court.⁽³⁾ If the rule expire in vacation, the attachment may be moved for on the first day of the ensuing term, and it is immaterial whether before that time the sheriff may have put in and perfected bail.⁽⁴⁾ The attachment should be moved for promptly, and four months' and three months' delay has been held too great;⁽⁵⁾ but if the plaintiff delay at the instance of the sheriff's officer, the sheriff is not discharged.⁽⁶⁾

The attachment is moved for by counsel, on an affidavit setting forth that the rule was served by giving a copy or the original,⁽⁷⁾ or that the original was shown at the time, and that no bail has been put in, or, if put in, not justified. If the affidavit is defective, the application may be renewed on an amended affidavit.⁽⁸⁾

Form of Affidavit of Service of Rule.

[*Title of court and cause.*]

I, P. A. C., of _____, clerk to P. A., gentleman, attorney for the above-named plaintiff in this cause, make oath and say—

1. That I did, on _____, the _____ day of _____, [*instant*] serve &c.
2. That no bail above has been put in for the defendant in this cause [or that bail above has been put in for the defendant in this cause, but that the same has not been perfected.] [*If in C. P., add, and that I have this day searched, with the proper officer of the court, for that purpose.*]

The rule for an attachment is absolute in the first instance.⁽⁹⁾

⁽¹⁾ Rule Pr. 134, H. T. 1853, *ante*, pp. 806-7.

⁽²⁾ *R. v. Sheriff of Middlesex*, 8 T. R. 464; 1 Burr. 651 n.; 2 Saund. 61 d.

⁽³⁾ *R. v. Sheriff of Surrey*, 11 East, 591; *R. v. Sheriff of Middlesex*, 1 Dowl. 53.

⁽⁴⁾ Rule Pr. 90, H. T. 1853; *ante*, p. 806.

⁽⁵⁾ *R. v. Perring*, 3 B. & P. 151; *R. v. Sheriff of Surrey*, 9 East, 467.

⁽⁶⁾ *Pople v. Wyatt*, 15 East, 215; *R. v. Sheriff of London*, 1 D. & R. 163.

⁽⁷⁾ *Leaf v. Jones*, 3 Dowl. 315

⁽⁸⁾ *R. v. Smythies*, 3 T. R. 351.

⁽⁹⁾ Rule Pr. 168, H. T. 1853.

(c) *Setting aside and staying proceedings.*]—‘The proceedings will be set aside for irregularity according to circumstances, many of which have been already stated, and which it is unnecessary to specify; thus, where the action on the bail-bond is commenced too soon; (1) where the rule to bring in the body is sued out before the time for putting in bail has expired. (2) So where an action has been brought on the bail-bond contrary to good faith. (3) So if the plaintiff proceed against the sheriff or on the bail-bond, knowing that the defendant had died before the eight days for putting in bail had expired. (4) So, in some cases, where the defendant and both bail have become bankrupts. (5)

The application to set aside must, as in ordinary cases, be made promptly. It is not necessary, before applying, to put in bail to the original action. (6)

The court may *stay proceedings* on bail-bonds, where the proceedings are perfectly regular, and may afford by rule such relief to the plaintiff or defendant in the original action, and to the bail, as is agreeable to justice and reason, and such rule shall have the effect of a defeasance to the bail-bond. (7) The court will also, on similar principles, relieve the sheriff, unless he has been guilty of some breach of duty. (8) In all cases of bailable proceedings under the act 1 & 2 Vict. c. 110, the proceedings will be stayed on putting in or perfecting bail, or payment into court in lieu of bail, or tender and payment of costs. (9)

Proceedings on the bail-bond may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more. (10) This application should be made before verdict. (11)

The application to stay cannot be made until either bail has

(1) *Alston v. Underhill*, 1 Cr. & M. 492; *Anon.* 2 Chitt. R. 103.

(2) *Rolfe v. Steele*, 2 H. Bl. 276.

(3) *Sweeting v. Weaver*, 11 Price, 734.

(4) See *R. v. Sheriff of Middlesex*, 3 T. R. 133; *R. v. Sheriff of Essex*, 8 Sc. 363.

(5) *Streeter v. Scott*, 2 Dowl. 362; *Coulson v. Hammond*, 2 B. & C. 626.

(6) *Heath v. Gurley*, 4 Moore, 149.

(7) 4 & 5 Anne, c. 16, s. 20.

(8) *R. v. Sheriff of Surrey*, 7 T. R. 239; *Todd v. Jacob*, 2 B. & Ald. 354; *R. v. Sheriff of Kent*, 2 M. & W. 316.

(9) *Ede v. Collingridge*, 11 M. & W. 61; 2 Dowl. N. S. 764; *R. v. Sheriff of Middlesex*, 15 M. & W. 146.

(10) Rule Pr. 85, H. T. 1853.

(11) *Johnson v. Macdonald*, 2 Dowl. 44.

been perfected⁽¹⁾ or put in, and the defendant rendered, or money is paid into court in lieu of bail. But the application may be made on the same day the bail justifies: ⁽²⁾ and it has been made even after execution sued out, and execution issued against the bail.⁽³⁾ When the application to stay proceedings is made by the bail, the court cannot impose terms on the defendant.⁽⁴⁾

Affidavit.]—"No rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall (if made on the part of the original defendant) be grounded on an *affidavit* of merits; or (if made on the part of the sheriff or bail, or any officer of the sheriff) be grounded on an affidavit, showing that such application is really and truly made on the part of the sheriff or bail, or officer of the sheriff (as the case may be). at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant."⁽⁵⁾ The affidavit on setting aside an attachment must be intituled "The Queen against the Sheriff of _____, in a cause of A. B. v. C. D.;" on setting aside proceedings on the bail-bond, it must be intituled in the original action or in the action on the bond.⁽⁶⁾ If it is an affidavit of merits, it must be positively stated that there is a "good defence on the merits."⁽⁷⁾ If the attorney of the defendant makes the affidavit, he must so describe himself;⁽⁸⁾ but if it is made on behalf of the bail, this need not be stated, provided it is stated there is a good defence on the merits.⁽⁹⁾ It seems all the bail must make the application.⁽¹⁰⁾ It is not sufficient to say the application is for their "own," or their "only"

⁽¹⁾ *Heath v. Gurley*, 4 Moore, 149.

⁽²⁾ *Shawe v. Johnstone*, 2 Chitt. R. 108.

⁽³⁾ *Lepine v. Barrett*, 8 T. R. 223.

⁽⁴⁾ *Call v. Thelwell*, 3 Dowl. 443; 1 Cr. M. & R. 780; *Gale v. Hayworth*, 6 Dowl. 323.

⁽⁵⁾ Rule Pr. 88, H. T. 1853.

⁽⁶⁾ *Lines v. Chetwood*, 1 Dowl. 321; 2 Cr. & J. 332; *Kelly v. Wrother*, 2 Chitt. R. 109. In the C. P. it is intituled in the action on the bond; *Ham v. Philcox*, 7 Moore, 52; *ibid.* 600.

⁽⁷⁾ *Grottick v. Bailey*, 5 B. & Ald. 703; *Lane v. Isaacs*, 3 Dowl. 652; *Crosby v. Innes*, 5 Dowl. 566.

⁽⁸⁾ *Bonnefor v. Russel*, 5 Dowl. 546.

⁽⁹⁾ *Bell v. Taylor*, 1 Chitt. R. 572.

⁽¹⁰⁾ *Ridgway v. Porter*, 3 Dowl. 443; *Dawson v. Cull*, 2 Cr. & J. 671.

indemnity, or for their "protection."⁽¹⁾ The court will sometimes give time to produce an amended affidavit.⁽²⁾

When the rule is made absolute, an appointment should be obtained from the Master to tax costs, which should be forthwith paid, otherwise the rule will not be a stay of proceedings.

Proceedings in original action after stay.—Where the proceedings have been stayed generally, on payment of costs, the defendant may plead his bankruptcy in bar to the original action,⁽³⁾ but not in abatement.⁽⁴⁾

When the defendant pays the debt and costs in the action against him, the proceedings against the bail will be stayed on payment of the costs in the action against them.⁽⁵⁾

"In all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it."⁽⁶⁾

When stay or setting aside refused.—If the sheriff fail to set the attachment aside, he must pay the whole debt and costs in the original action, and the costs of the attachment.⁽⁷⁾ Though he in general is reimbursed by his bailiff, he can maintain no action against the defendant for money paid,⁽⁸⁾ nor detain the defendant in custody.⁽⁹⁾

If the bail-bond be not set aside or stayed, the bail must pay the debt and costs of the original action, together with the costs of the action against the bail.⁽¹⁰⁾

7. Fees of Sheriff.

These are stated at the end of this volume, along with the sheriff's fees in other proceedings.

⁽¹⁾ *Cull v. Thelwell*, 3 Dowl. 443; *R. v. Sheriff of Cheshire*, 6 Dowl. 709; 3 M. & W. 605; *R. v. Sheriff of Middlesex*, 8 A. & E. 938.

⁽²⁾ *R. v. Sheriff of Cheshire*, 3 M. & W. 605; *Merryman v. Quibble*, 1 Chitt. R. 117; but see *R. v. Sheriff of Middlesex*, 8 A. & E. 938.

⁽³⁾ *Sainsbury v. Gandon*, 3 M. & R. 16.

⁽⁴⁾ *Anon.* 2 Salk. 519.

⁽⁵⁾ *Belts v. Smyth*, 2 Q. B. 113.

⁽⁶⁾ Rule Pr. 84, H. T. 1853.

⁽⁷⁾ *R. v. Sheriff of Devon*, 1 B. & Ad. 159; *R. v. Sheriff of Middlesex*, 15 M. & W. 146; 3 D. & L. 472.

⁽⁸⁾ *Pitcher v. Bailey*, 8 East, 171.

⁽⁹⁾ *Rimmer v. Turner*, 3 Dowl. 601. See, where the bailiff paid the money, and recovered from a defendant, whose misconduct caused the loss, and who specially promised an indemnity, *White v. Laroux*, 1 M. & M. 347.

⁽¹⁰⁾ *Stevenson v. Cameron*, 8 T. R. 28; *Mitchell v. Gibbons*, 1 H. Bl. 76.

CHAPTER XVII.

SPECIAL BAIL.

- | | |
|--|---|
| 1. Bail in town.
(a) Who, and how many.
(b) In what cases.
(c) By whom, when and how put in.
(d) Notice of and accepting or excepting to bail.
(e) Justification of bail. | 2. Bail in the country.
3. Putting in bail when defendant in custody.
4. Paying money in lieu of bail.
5. Liability and discharge of special bail.
6. Proceedings against bail.
(a) Bail in error. |
|--|---|

(a) *Who, and how many.*]—Special bail, or bail above, are the persons who undertake to be responsible for the defendant's paying the debt and costs which may be found due, or rendering himself to the keeper of the Queen's prison. The bail must be not less than two in number.⁽¹⁾ It is irregular to give notice of more bail than two;⁽²⁾ but the court or a judge in heavy cases will allow more.⁽³⁾

The chief qualification of a bail is that he possesses sufficient property to satisfy his recognizance, and which might be made available for that purpose. Hence, in general, any one may be bail who is a housekeeper or freeholder, and is worth double the amount sworn to over and above what will pay his just debts, and over and above every other sum for which he is then bail, except when the sum sworn to exceeds 1,000*l.*, when it shall be sufficient in the bail to justify in 1,000*l.* beyond the sum sworn to.⁽⁴⁾ But no person

⁽¹⁾ *Stewart v. Bishop*, Barnes, 60; 1 Chitt. R. 602 n.; *White's bail*, 5 Dowl. 133.

⁽²⁾ Rule Pr. 91, H. T. 1853.

⁽³⁾ *Easter v. Edwards*, 1 Dowl. 39; 1 Sel. 159.

⁽⁴⁾ Rules Pr. 98, 101, H. T. 1853.

can be so, who is indemnified for so doing by the defendant's attorney; ⁽¹⁾ nor can the bail be (except for the purpose of rendering) a practising attorney, or clerk of a practising attorney, or a sheriff's officer, bailiff, or person concerned in the execution or process, and such bail may be treated as a nullity; ⁽²⁾ nor can a peer or other person privileged from arrest. ⁽³⁾ Further qualifications of these general rules are stated more fully *post*, "Opposing Justification."

(b) *In what cases.*—Special bail must be put in in all cases where the defendant has been once arrested and is at large; but if the defendant has made a deposit with the sheriff (*ante*, p. 797), he may, in lieu of putting in special bail, allow that deposit to be paid into court, and must also pay 10*l.* additional, as a security for costs, and enter appearance to the writ of summons; or if he has not made any deposit with the sheriff, he may, in lieu of putting in special bail, pay at once into court the sum indorsed on the writ, and 20*l.* more as a security for costs. ⁽⁴⁾ If the plaintiff, after being discharged on giving a bail-bond to the sheriff, put in special bail within the eight days after the arrest, and the sheriff choose to accept of the surrender (which he is not bound to do), ⁽⁵⁾ this prevents proceedings on the bail-bond. ⁽⁶⁾

(c) *By whom put in.*—Special bail may be put in by the defendant or his attorney, or by the sheriff; ⁽⁷⁾ or by the bail to the sheriff, ⁽⁸⁾ and, it seems, no order to change an attorney is required for this step, ⁽⁹⁾ and if the sheriff has already put in and justified bail, the defendant may still have his also allowed. ⁽¹⁰⁾

When put in.—Bail may be put in after the writ is issued,

⁽¹⁾ Rule Pr. 93, H. T. 1853; yet he may be indemnified by any other person, *Neat v. Allen*, 1 B. & P. 21; so one who is to receive a commission on the sum sworn to cannot be bail, *Fozall's bail*, 7 D. & R. 783.

⁽²⁾ Rule Pr. 94, H. T. 1853.

⁽³⁾ *Duncan v. Hill*, 1 D. & R. 126; *Graham v. Stewart*, 4 Taunt. 249; *Lock's bail*, 1 Dowl. 124.

⁽⁴⁾ 7 & 8 Geo. 4, c. 71.

⁽⁵⁾ *Hamilton v. Wilson*, 1 East, 383.

⁽⁶⁾ *Plimpton v. Howell*, 10 East, 100; *Hodgson v. Mee*, 3 A. & E. 765; 5 N. & M. 302.

⁽⁷⁾ *Wheeler v. Ranken*, 1 Chitt. R. 81.

⁽⁸⁾ *Berchers v. Colson*, 2 Str. 876.

⁽⁹⁾ *Plomer v. Houghton*, 2 B. & Ald. 604; see 2 Chitt. R. 76.

⁽¹⁰⁾ *Wheeler v. Rankin*, 1 Chitt. R. 81.

though there has been no arrest.⁽¹⁾ But it must in all cases, where the arrest has taken place, be put in within eight days, inclusive of the day of arrest.⁽²⁾ It seems, if the last day be a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, it is not reckoned;⁽³⁾ though the defendant may put in bail on a *dies non*, unless it be a Sunday.⁽⁴⁾ Where the last day was Easter Monday, the court held the time extended to the Wednesday following.⁽⁵⁾ Bail must be put in as usual in the long vacation.⁽⁶⁾ Bail may be put in any time during the suit, and even after final judgment, and before defendant is charged in execution;⁽⁷⁾ but they cannot justify after charge in execution.⁽⁸⁾ The time for putting in bail may be enlarged, if a summons be taken out at the judge's chambers, returnable before the expiry of the time for putting in bail.⁽⁹⁾ An affidavit is generally necessary for this purpose, setting forth the grounds of the application. Where a rule for staying the proceedings has been obtained and is discharged, the defendant has not the same number of days to put in bail after the discharge of the rule as he would have had if no rule had been obtained, but he ought to be prepared immediately after the rule is discharged, i. e., on the same day, to put in bail, or he may, during the pendency of this rule for a stay, put in bail without prejudice.⁽¹⁰⁾

How bail put in.]—In town, bail is put in before a judge at chambers, or during vacation before a judge at his house, or before a commissioner appointed under 1 & 2 Vict. c. 45, s. 4, to take bail; in the country, it is put in before a commissioner, or a judge of the superior courts on circuit. It is generally put in *de bene esse*, i. e., subject to the objection of the plaintiff, or with the plaintiff's consent it may be put in absolutely. The defendant goes with his bail to the

(1) *Evans v. Sweet*, 9 Moore, 556; 2 Bing. 271.

(2) 1 & 2 Vict. c. 110, s. 4; 2 Will. 4, c. 39, s. 10; *Grant v. Gibbs*, 1 Hodg. 56.

(3) Rule Pr. 174, H. T. 1853.

(4) *Baddeley v. Adams*, 5 T. R. 170; see *Bennett v. Potter*, 2 C. & J. 622.

(5) *Alston v. Undershill*, 1 Cr. & M. 492.

(6) 2 Will. 4, c. 39, s. 11; *Wollaston v. Wright*, 2 Dowl. 286; 4 Cr. & M. 333.

(7) *Stanton's bail*, 2 Chitt. R. 73.

(8) *Bircham v. Chambers*, 11 Moore, 343.

(9) *Joyce v. Pratt*, 6 Bing. 377.

(10) *St. Hanlaire v. Byam*, 4 B. & C. 970; *Hughes v. Walden*, 5 B. & C. 770.

judge's chambers with a bail-piece filled up, a form of which can be had at a law stationer's. The judge's clerk takes the bail, i. e., he formally asks them whether they jointly and severally undertake that if C. D. is condemned in the action, he shall satisfy the costs and condemnation, or render himself to the Queen's prison, or they will do it for him. The bail then assent in the Queen's Bench and Common Pleas; and they also sign the bail-piece in the Exchequer. The bail-piece is afterwards signed by the judge. In the Queen's Bench it is filed and entered in the bail-book, and remains at the judge's chambers until the bail are perfected.

Form of Bail-piece.

In the Q. B.

On the day of , A.D. 18 .

[*the county in the writ*] to wit. C. D. is delivered to bail upon a *cepi corpus*, to

B. B., of ,

and

T. B., of ,

At the suit of A. B.

Bail for £ , by order of , [*name of* }
judge who made the order to hold to bail.] }

D. A., of , attorney for defendant. }

Taken and acknowledged conditionally at my chambers, in Rolls Gardens, this day of , A. D. 18 , before me,

[*Judge's signature.*](¹)

Requisites of bail-piece.—The bail-piece should state accurately the date and the county; (²) the title of the court and cause; (³) the sum sworn to: (⁴) the names of the parties; (⁵) or that the defendant was arrested under a wrong name. (⁶)

(¹) In the Common Pleas, the body of the bail-piece runs thus: "Writ of *capias* against C. D., late of , at the suit of A. B., for £ in debt [*or promises, &c.*] Dated, &c. The bail are B. B., of , and T. B., of , each of whom is bound in £ ." In the Exchequer, the body of the bail-piece is, "C. D. is delivered to bail upon a *cepi corpus*, to B. B., of , and T. B., of , at the suit of A. [*Then the bail sign their names.*"]

(²) *Smith v. Miller*, 7 T. R. 96; see *Bridger v. Smith*, 3 M. & Sel. 532.

(³) *Hall's bail*, 1 Chitt. R. 79.

(⁴) *Faget v. Vanthiennen*, Barnes, 59.

(⁵) *Holt v. Frank*, 1 M. & Sel. 199; *Fenton v. Ruggles*, 1 B. & P. 356; *Anon.* 1 Moore, 126.

(⁶) *Hole v. Finch*, 2 Wils. 393; *Smithson v. Smith*, Willes, 462; *R. v. Sheriff of Suffolk*, 4 Taunt. 818. But if the bail-piece give the defendant a wrong name, and the notice of bail states his right name, it is enough, *Anon.* 2 Chitt. R. 81.

Application may be made in most cases to the court to amend. The court has refused to amend the bail-piece without the consent of the bail.⁽¹⁾

(*d*) *Notice of bail, when, and by and to whom.*—Where bail is put in merely to render, no notice to the other side is, perhaps, necessary; ⁽²⁾ but when bail is put in conditionally, it is, ⁽³⁾ and should be served forthwith, and before the time for putting in bail has expired. Sometimes the bail are justified when put in, in which case four days' previous notice must be given "before eleven o'clock in the morning, and exclusive of Sunday," subject to the plaintiff's right to extend the time.⁽⁴⁾ The notice is served in the usual way upon the plaintiff in person, or on his attorney, if he has one. The notice should be given by the defendant's attorney, though the attorney for the sheriff's bail may give it without any previous order to change the attorney.⁽⁵⁾

How.—The notice must be in writing, and intitled in the court and cause.⁽⁶⁾ It must truly state the names and descriptions of the bail; thus, it is improper to describe, as being a gentleman, a baker, or "Scotch ale agent," or "clerk in a mercantile house;"⁽⁷⁾ though a gentleman may be a proper description for a schoolmaster or clerk in the custom house or post office.⁽⁸⁾ "A manufacturer" is too vague a description; ⁽⁹⁾ but not a shopkeeper, or yeoman.⁽¹⁰⁾ If two persons of the same name reside together, the "younger," or "elder," must be added.⁽¹¹⁾

"Every notice of bail shall, in addition to the descriptions of the bail, mention the street or place and number, if any, where each of the bail resides, and all the streets or places and numbers, if any, in which each of them has been resident

(1) *Bingham v. Dickie*, 5 Taunt. 814.

(2) *Wilson v. Griffin*, 2 C. & J. 683.

(3) *Tidd*, 253; *Grant v. Gibbs*, 1 Hodg. 56.

(4) Rule Pr. 96, H. T. 1853, *post*, "Notice of Justification."

(5) *Plomer v. Houghton*, 2 B. & Ald. 604.

(6) *Anon.* 2 Chitt. R. 77; *ibid.* 81.

(7) *Wood v. Chadwick*, 2 Taunt. 173; *Anon.* 1 Chitt. R. 494; *ibid.* 76; *Moss v. Heaviside*, 9 D. & R. 772; *Flemming's bail*, 1 Cr. & M. 111; *Ibid.* 501.

(8) — *v. Pasman*, 5 Taunt. 759; *Anon.* 1 Chitt. R. 494; *Wood v. Ray*, 2 Dowl. 692.

(9) *Fearnley's bail*, 1 Dowl. 40; see 3 Dowl. 87.

(10) *Lanyon's bail*, 3 Dowl. 87.

(11) *Smith v. Mellon*, 5 Taunt. 854.

at any time within the last six months, and whether he is a housekeeper or freeholder.”⁽¹⁾ The notice should also state correctly the judge before whom the bail was put in,⁽²⁾ but need not state where the bail was put in.

“Notice of more than two bail shall be deemed irregular, unless by the order of the court or a judge.”⁽³⁾ The rule or order, when necessary, should be obtained and served at the same time as the notice.⁽⁴⁾ The following is a

Form of Notice of putting in Bail.

In the Q. B. [“C. P.,” or “Exch. of P.”]

Between A. B., plaintiff,
and

C. D. defendant.

Take notice, that special bail has this day been put in in the above cause for the defendant, before the Honourable Mr. Justice , [or baron] at his chambers, in Rolls Gardens, London, and the names, descriptions, and particulars of and relating to such bail are as follows. One of the said bail is B. S., of No. , street, , in the county of , who is a housekeeper there, and who is also a freeholder of a messuage and land in the parish of , in the county of , and which is now in the possession of T. T., as his tenant, and the said B. S. did reside from or about the day of last, until or about the day of last, at No. , street, in the county of , and at the latter date he removed from thence to No. , street, in the county of , where he resided until or about the day of last, when he removed to No. , street, in the county of , and from that time the said B. S. has resided there continually till this day. The other bail is B. T., of No., &c. [If an affidavit of sufficiency accompany the notice, as stated post, p. 818, then add, “And further take notice, that the said B. S. and B. T. have duly made and sworn to the affidavits, which accompany this notice for your perusal, and copies of which affidavits are herewith left.”] Dated this day of A. D. 18 .

To P. A., &c.

Yours, D. A., &c.

If it is intended that the bail should justify at the same

(1) Rule Pr. 97, H. T. 1853.

(2) *Kelly v. Wrother*, 2 Chitt. R. 189.

(3) Rule Pr. 91, H. T. 1853.

(4) An affidavit of the defendant is necessary on the application for the order, and should state the sum for which defendant has been arrested, and that “the said alleged debt being so large, I am unable to procure two persons respectively able and willing to swear that he is worth double the sum sworn to in this action, over and above what will pay his just debts, but that P. B. is able and willing to become and justify as bail for me, to the amount of double the sum of £ , and that Q. B., &c., [stating the several persons, and the amount each undertakes] as they have respectively informed me, and as I verily believe.”

time they are put in as stated *ante*, p. 815. The following may be the

Form of Notice that Bail will be put in and justified at the same time.

Take notice, that special bail will be put in in this cause for the defendant, on the day of next [*or instant*] in open court, at Westminster Hall, and will at the same time justify themselves [*or "will be put in, &c., and will on the same day, at the hour of of the clock in the forenoon, justify themselves before the Honourable Mr. Justice , or such other judge as shall be then sitting, at his chambers, in Rolls Garden, London,"*] as good and sufficient bail for the defendant in this cause. And further take notice that the names and descriptions of the said bail, &c. [*as in previous form.*]

If the notice is defective or irregular, it will be a good ground for opposing the justification, and exempting the plaintiff from paying the costs; but he cannot, in general, treat this as a nullity.⁽¹⁾ The court will allow the defect to be amended, where the opposite attorney has not been misled.

Affidavit of justification with notice of bail.]—"If the notice of bail shall be accompanied by an affidavit of each of the bail, according to the following form, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendant shall pay the costs of opposition, unless the court or a judge thereof shall otherwise order."⁽²⁾

Form of Affidavit of Justification referred to.

In the Q. B. [*"C. P." or "Exch. of P."*]

Between A. B., plaintiff,
and

C. D., defendant.

I, B. B., one of the bail for the above-named defendant, make oath and say—

1. That I am a housekeeper [*or freeholder, as the case may be*], residing at , [*describing particularly the street or place, and number, if any*]; that I am worth property to the amount of £ ; [*the amount required by the practice of the courts.*] over and above what will pay all my just debts (*if bail in any other action add, "and every other sum for which I am now bail."*)

⁽¹⁾ *Duncombe v. Crisp*, 2 Dowl. 5; 1 Cr. & M. 482; *Wigley v. Edwards*, 2 Dowl. 281; 2 Cr. & M. 320.

⁽²⁾ Rule Pr. 98, H. T. 1853.

2. That I am not bail for any defendant except in this action [*or if bail in any other action or actions add, "except for C. D., at the suit of E. F., in the court of , in the sum of £ , for G. H., at the suit of I. K., in the court of , in the sum of £ [specifying the several actions, with the courts in which they are brought and the sums in which the deponent is bail.]*

3. That my property, to the amount of the said sum of £ , (*if bail in any other action or actions, here add, "and of all other sums for which I am now bail as aforesaid,"*) consists of (*here specify the nature and value of the property in respect of which the bail proposes to justify, as follows*) "stock-in-trade in my business of , carried on by me at , of the value of £ ; of good book debts owing to me to the amount of £ ; of furniture in my house at , of the value of £ ; of a freehold [*or leasehold*] farm, of the value of £ , situate at , occupied by ; *or, of a dwelling-house of the value of £ , situate at , occupied by ; or of other property, particularising each description of property, with the value thereof.*)

4. That I have for the last six months resided at [describing the place or places of such residence.]

Sworn, &c.

B. B.

A copy of the affidavit should be sent with, and referred to by, the notice of bail, and headed "copy," and should state where the original is filed with the bail-piece.⁽¹⁾ The above form should be followed as closely as possible. The affidavit has been held insufficient for using "householder" instead of "housekeeper" or "freeholder,"⁽²⁾ for omitting the words "what will pay," in "over and above what will pay all my just debts,"⁽³⁾ for stating that the property consisted of household furniture and effects without adding what these were.⁽⁴⁾ But the affidavit has been held sufficient, though, in swearing as to "good book debts" it omitted "book;"⁽⁵⁾ though the value of the property described was omitted, such value appearing by reference to another part of the affidavit;⁽⁶⁾ though it stated the bail was "not bail for any," without adding "other person;"⁽⁷⁾ though only one of two residences kept by the defendant during the whole of the six months was stated.⁽⁸⁾ The

(1) *West v. Williams*, 3 B. & Ad. 345; 1 Dowl. 162; *De Bode's bail*, 1 Dowl. 368.

(2) *Anon.* 1 Dowl. 127; *Wilson's bail*, 2 Dowl. 431.

(3) *Stevens v. Miller*, 2 M. & W. 368.

(4) *Cooper's bail*, 3 Dowl. 692; *Weller's bail*, 6 Dowl. 312.

(5) *Lanyon's bail*, 3 Dowl. 85.

(6) *Boyd's bail*, 1 Hodg. 93; 1 Sc. 698.

(7) *Smith's bail*, 1 Dowl. 514.

(8) *Benbow's bail*, 6 Dowl. 714.

object of the affidavit being to give the plaintiff the materials for inquiring and satisfying himself as to the facts, if the affidavit is vague, the court may give the plaintiff further time to inquire,⁽¹⁾ or may allow an amendment;⁽²⁾ and though the bail may justify if they are sufficient⁽³⁾ the defendant will not be allowed costs of justification,⁽⁴⁾ and, in general, the defendant must pay the costs of opposing the justification, if the objection is not too frivolous.⁽⁵⁾ The bail may justify for property not described in the affidavit.⁽⁶⁾

Accepting of bail.—When notice has been given of special bail, the plaintiff will require to consider whether he should accept of them or except to them, the risk of the latter course being that he may lose his costs if the bail justify, and if the affidavit of sufficiency, mentioned *ante*, p. 818, accompanied the notice; and sometimes even the court may refuse him the costs of opposition, though the bail are rejected. If the plaintiff accept of the bail or do not except to them in due time, the defendant's attorney may at once obtain the bail-piece from the judge's clerk and file it at the proper office.⁽⁷⁾

Excepting to the bail.—If the plaintiff shall not give one day's notice of exception to the bail, by whom the affidavit of justification, stated *ante*, p. 818, shall have been made, the recognizance of such bail may be taken out of court without other justification than such affidavit.⁽⁸⁾ “Where notice of bail shall not be accompanied by such affidavit, and in bail in error, the plaintiff may except thereto within twenty days next after the putting in of such bail, and notice thereof given in writing to the plaintiff or his attorney; or, where special bail is put in before any commissioner, the plaintiff may except thereto within twenty days next after the bail-piece is transmitted, and notice thereof given as aforesaid; and no exception to bail shall be admitted after the

(1) *Anon.* 1 Dowl. 159.

(2) *Warren v. De Burgh*, 7 Dowl. 96. See 1 Dowl. 571, 605, 704.

(3) *De Bode's bail*, 1 Dowl. 301; *Anon. ib.* 126; *Poppoy's bail*, 3 Dowl. 170.

(4) *Miller's bail*, 5 Dowl. 602; *Heald's bail*, 3 Dowl. 423.

(5) *Innis v. Muir*, 2 C. & J. 634; 2 Tyr. 742.

(6) *Hemming v. Blake*, 1 Dowl. 179; *ibid.* 172.

(7) Rule Pr. 99, H. T. 1853.

(8) *Ibid.*

time hereinbefore limited.”⁽¹⁾ In the case of added bail, no excepting is necessary,⁽²⁾ nor where bail has been put in after the proper time.⁽³⁾ When bail to the sheriff become bail to the action, the plaintiff may except to them, though he has taken an assignment of the bail-bond.⁽⁴⁾ If the plaintiff do not except to the bail in proper time, he waives all objection to the regularity of the proceedings, and cannot take an assignment of the bail-bond.⁽⁵⁾

Entering, and notice of, exception.—The exception to the bail will be ineffectual unless it is entered in the bail book, at the judge’s chambers, within the twenty days after service of notice of bail;⁽⁶⁾ or if the affidavit of justification, mentioned *ante*, p. 818, has been served with the notice of putting in bail, then the exception must be entered at least one day before the putting in of bail.⁽⁷⁾ A notice, without a previous entry of the exception, seems to be a mere nullity.⁽⁸⁾ In the Common Pleas and Exchequer the exception is entered in the Master’s book, or on the bail-piece if taken by commission. The entry is merely thus :

“I except against these bail” [or “against B. C., one of these bail.”]

P. A.
(Date.)

After the exception is entered, notice thereof must be given in writing to the defendant’s attorney,⁽⁹⁾ and this is generally done immediately. The notice must be given within the same time as the entry. It must be properly intituled.⁽¹⁰⁾ If no notice has been given, the irregularity will be waived by the defendant’s giving notice of justification.⁽¹¹⁾

⁽¹⁾ Rule Pr. 100, H. T. 1853.

⁽²⁾ *Gregory v. Gurdon*, Barnes, 74.

⁽³⁾ *Turner v. Cary*, 7 East, 607; *Nunn v. Rogers*, 2 Chitt. R. 108

⁽⁴⁾ Rule Pr. 86, H. T. 1853.

⁽⁵⁾ *Bologna v. Vantrin*, Cowp. 828; *Bell v. Gats*, 1 Taunt. 162.

⁽⁶⁾ Rule Pr. 99, H. T. 1853.

⁽⁷⁾ *Hodson v. Garrett*, 1 Chitt. R. 174; *Thwaites v. Gallington*, 4 D. & R. 365. But see *Hanwell’s bail*, 3 Dowl. 425.

⁽⁸⁾ *R. v. Sheriff of Middlesex*, 5 B. & C. 389; 8 D. & R. 149; Rule Pr. 100, H. T. 1853.

⁽⁹⁾ *R. v. Sheriff of Middlesex*, 5 B. & C. 389; 8 D. & R. 149; *Oldham v. Barrell*, 7 T. R. 26.

⁽¹⁰⁾ *R. v. Sheriff of Middlesex*, 1 Chitt. R. 741; *ibid.* 374.

⁽¹¹⁾ *Cohen v. Davis*, 1 H. Bl. 80; *ibid.* 106.

The following is the usual—

Form of Notice of Exception to Bail.

In the Q. B. ["C. P." or "Exch. of P."]

Between A. B., plaintiff,
and

C. D., defendant.

Take notice that I have excepted against the bail [or, B. C., one of the bail] put in in this cause for the defendant. Dated, &c.

P. A.

To D. A., &c.

If the bail are to be put in and justified at the same time, the form may be adapted accordingly, thus :

—— "that I except to the intended bail, whereof notice has been given in this cause, and do hereby require them to justify in person, in open court, in Westminster Hall, notwithstanding the affidavits made by them, and which accompanied the notice of bail served in this cause. Dated, &c.

Adding and changing bail.]—It is not a sufficient ground for applying to change the bail, that the defendant expected the action would be settled.⁽¹⁾ "The bail, of whom notice shall be given, shall not be changed without leave of the court or a judge."⁽²⁾ Hence, if from illness, or other good cause,⁽³⁾ it be expedient to change or add to the bail, application must be made to the court, or a judge at chambers, for a rule or summons to do so, and, if necessary, for extended time to justify. The application should be made before the time appointed for the justification, and be supported by an affidavit setting forth the circumstances. A copy of the affidavit, and of the summons, should be served forthwith on the opposite attorney. The summons should be made returnable before the time for justification has expired; it is a stay of proceedings.⁽⁴⁾ If the judge allow the change on payment of costs, these must be paid before justification.⁽⁵⁾ On leave obtained, the names of the new bail must be added to the bail-piece. The court will order an *exoneretur* to be entered as to the former bail any time before a *scire facias* is brought against them,⁽⁶⁾ or will,

(1) *Orchard v. Glover*, 9 Bing. 318; 1 Dowl. 707.

(2) Rule Pr. 92, H. T. 1853.

(3) See *Elliott v. Gutteridge*, 6 Dowl. 255; 2 Jur. 135; *Whitehead v. Minn*, 2 C. & J. 54.

(4) *Redford v. Edie*, 6 Taunt. 640.

(5) *Jourdain v. Green*, 2 Tyr. 491.

(6) *Tubb v. Tubb*, Say. 58; *ibid.* 308.

after the *scire facias*, stay proceedings on payment of costs, or allow an *exoneretur* to be entered *nunc pro tunc*.⁽¹⁾ The plaintiff's attorney must be served with notice of bail two days before they justify.⁽²⁾

(e) *Notice of justification of bail.*]—"A defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of Sunday. If the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof, as aforesaid, to the defendant, his attorney, or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days, then, unless the court or a judge shall otherwise order, the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the meantime."⁽³⁾ "In all cases bail, either to the action or in error, shall be justified, when required, within four days after exception, before a judge at chambers, both in term and vacation."⁽⁴⁾ And "it shall be sufficient in all cases, if notice of justification of bail be given two days before the time of justification."⁽⁵⁾

The notice must be intituled in the court and cause,⁽⁶⁾ and must contain the christian and surname of the bail.⁽⁷⁾ It need not state the description and residence of the bail.⁽⁸⁾ It must state the time when the bail will justify.⁽⁹⁾

The following is the usual—

Form of Notice of Justification.

In the Q. B. ["C. P." or "Exch. of Pleas."]

Between A. B., plaintiff,
and

C. D. defendant.

Take notice that B. M. and B. N., the bail already put in in this

⁽¹⁾ *Fulke v. Bourke*, 1 W. Bl. 462; *Humphrey v. Loite*, Burr. 2107.

⁽²⁾ *Key v. Macintyre*, 2 M. & W. 336; 5 Dowl. 453; *Perry's bail*, 2 C. & J. 475; 1 Dowl. 564.

⁽³⁾ Rule Pr. 96, H. T. 1853.

⁽⁴⁾ Rule Pr. 103, H. T. 1853.

⁽⁵⁾ Rule Pr. 102, H. T. 1853.

⁽⁶⁾ *Anon.* 2 Chitt. R. 77.

⁽⁷⁾ *Taylor v. Halliburton*, 1 Chitt. R. 351 n.

⁽⁸⁾ *England v. Kirwan*, 1 B. & P. 335; *Higgs' bail*, 1 Dowl. 124, But in the C. P. see R. M. 7 Geo. 4; 4 Bing. 51.

⁽⁹⁾ *Stains v. Stoneham*, 4 Dowl. 678.

cause for the defendant, and of whom you have before had notice, will, on next, justify themselves [*if country bail, "by affidavit"*] in open court at Westminster Hall, in the county of Middlesex [*if before a judge at chambers, say, "will, at the hour of o'clock in the forenoon, on next, justify themselves (by affidavit), before the Honourable Mr. Justice [or "Baron"] , or such other judge as shall be then sitting at chambers in Rolls-garden, Chancery-lane, London*], as good and sufficient bail for the said defendant in this action. [*If in the C. P., add the description and residences of the bail for the last six months, as in the form, ante, p. 817*].

Dated the day of , A. D. 18 .
P. A., &c.

D. A.

The notice of justification may be given by the attorney of the sheriff's bail, though the notice of bail had been given by the defendant's attorney.⁽¹⁾

Justifying, how.—Bail need not justify if an affidavit of justification was sent with notice of bail, and no exception has been entered against them one day before the day appointed;⁽²⁾ but, if no such affidavit was sent, they must justify. In other cases, if they have been put in in time, they need only justify if duly excepted to; but if not duly put in, they must justify, whether excepted to or not. The bail justify before a judge at chambers both in term and vacation. For this purpose, in the Common Pleas or Exchequer, notice must be given the preceding day to the officer to have the bail-piece at the judge's chambers; in the Queen's Bench it is retained there. The bail then attend on the day appointed, and are sworn by the judge's clerk, who asks if they are housekeepers or freeholders, and are worth the amount to be sworn to, and an order to admit them to bail is then granted if the opposition is unsuccessful. If the bail do not justify in time, proceedings may be had against them or the sheriff, and an assignment of the bail-bond during the same day is regular.⁽³⁾ While their names remain in the bail-piece, they may still render the principal.⁽⁴⁾

If bail become incompetent after the recognizance has been completed, the defendant cannot be called on to find fresh bail.⁽⁵⁾

⁽¹⁾ *Haggett v. Argent*, 7 Taunt. 47; *Plomer v. Houghton*, 2 B. & Ald. 604.

⁽²⁾ See *ante*, p. 818.

⁽³⁾ *Dent v. Weston*, 8 T. R. 4.

⁽⁴⁾ *R. v. Sheriff of Essex*, 5 T. R. 633.

⁽⁵⁾ *R. v. Shirley*, 12 L. J. 348, Q. B.

Opposing the justification.—After receiving notice of justification, the plaintiff should forthwith make his inquiries into the circumstances and solvency of the bail, and, if necessary, procure an affidavit on which the objections may be founded, thus :

Form of Affidavit on opposing Justification.

[*Title of court and cause*].

I, P. C., of , clerk of Mr. P. A., of , the attorney for the said plaintiff, make oath and say, that D. A., the attorney for the above-named defendant, having served the said P. A. with notice of justifying bail in this action, I have made inquiry, by the order and direction of the said P. A., into the sufficiency of the said bail, and I say—

1. That [*here state facts known to the deponent, avoiding mere matters of hearsay, and when the facts are obtained from an individual add*] “and which I verily believe to be true,” &c.

Bail are generally justified at judges' chambers, and it is not necessary to oppose by counsel. The bail may be examined by the plaintiff's attorney as to their property qualifications, and the defendant's attorney may re-examine or interpose to check questions unnecessarily prying. The grounds of opposition may be any irregularity in the notice of bail or service thereof, or in the notice of justification or service thereof, or in the affidavit of justification. The court, on such grounds, however, generally either give additional time to the plaintiff to inquire, or order defendant to give a fresh notice and pay the costs of plaintiff's attendance to oppose,⁽¹⁾ or, at least, refuse defendant the costs of justification.⁽²⁾ It is a ground of opposition that no bail-bond has been taken, and that an action of escape has been brought against the sheriff.⁽³⁾

Where the bail is a housekeeper or freeholder, it is no objection that the annual value of the house or freehold is trifling,⁽⁴⁾ or that he holds the house jointly with his partner in trade, who alone resides in it,⁽⁵⁾ or that he does not

⁽¹⁾ *Fearnley's bail*, 1 Dowl. 40.

⁽²⁾ *De Bode's bail*, 1 Dowl. 368; *Stevens v. Miller*, 2 M. & W. 368.

⁽³⁾ *Fuller v. Prest*, 7 T. R. 109; *Webb v. Matthew*, 1 B. & P. 225.

⁽⁴⁾ *Lofft*, 148, 328.

⁽⁵⁾ *Hemming v. Plenty*, 1 Moore, 529; *Savage v. Hall*, 1 Bing. 420; 8 Moore, 525.

reside in the house, if he has received rent from one of the lodgers.⁽¹⁾ But the house or freehold must not be out of the country,⁽²⁾ though a British subject may sometimes justify for property partly in England and partly abroad.⁽³⁾

A notice that bail is a householder is not satisfied by showing he is a lodger and also a freeholder.⁽⁴⁾ The house-keeper must be in actual possession of at least the main part of the house,⁽⁵⁾ and a copyhold estate in right of his wife is not sufficient.⁽⁶⁾ Where bail claims to be worth sufficient property, such property may consist of railway shares,⁽⁷⁾ but not of money deposited in the hands of bail to indemnify him.⁽⁸⁾ Bail has been rejected who remained liable on outstanding dishonoured bills;⁽⁹⁾ also, who had suffered his children or father to receive parochial relief,⁽¹⁰⁾ who has been outlawed after judgment.⁽¹¹⁾

If there is *fraud* in procuring the justification, the court or a judge will set aside the rule of allowance; in which event proceedings may be taken against the sheriff, or on the bail-bond.⁽¹²⁾ The court will not, however, set aside the rule of allowance merely because the bail have committed perjury;⁽¹³⁾ unless the defendant connived at the fraud.⁽¹⁴⁾ For bail to personate another person, is felony.⁽¹⁵⁾

Costs of justification or opposition.—The costs of justification must be paid by the plaintiff, where an affidavit of justification was served with the notice of bail, and he excepted to the bail without success.⁽¹⁶⁾ The defendant should apply for these costs at the justification.⁽¹⁷⁾ Where

(1) *Coshn v. Waterhouse*, 8 Moore, 365.

(2) *Anon.* 1 Dowl. 61; *Levy's bail*, 1 Chitt. R. 285. See Tidd, 9th edit. 270.

(3) *Ibid.*; *Beardmore v. Phillips*, 4 M. & Sel. 173; *ib.* 371.

(4) *Wilson's bail*, 2 Dowl. 431.

(5) *Bold's bail*, 1 Chitt. R. 288; *ibid.* 6, 316, 502.

(6) *Anon.* 2 Chitt. R. 97.

(7) *Pierpoint v. Brewer*, 15 M. & W. 201; 3 D. & L. 487.

(8) *Nichol's bail*, 1 Hodg. 77.

(9) *Barnesdell v. Stretton*, 2 Chitt. R. 79.

(10) *Holn v. Booth*, 2 Chitt. R. 78, 95.

(11) *R. v. Edwards*, 4 T. R. 440.

(12) *Foxall's bail*, 7 D. & R. 783; *Pickard v. Dobson*, 3 D. & R. 5.

(13) *Eaglefield v. Stephens*, 2 Dowl. 438; Tidd's N. Pr. 147.

(14) *Barling v. Waters*, 6 Bing. 423; *Dicass v. Warns*, 4 M. & Sc. 470; *Stockham v. French*, 1 Bing. 365.

(15) 21 Jac. 1, c. 26; 4 & 5 W. & M. c. 4, s. 4.

(16) Rule Pr. 98, H. T., 1853, *ante*, p. 818.

(17) *Fream v. Best*, 2 Dowl. 590.

the bail in such circumstances are rejected, the defendant must then pay the costs of opposition, unless the judge order to the contrary.⁽¹⁾ So where the affidavit is defective, yet on other grounds the bail are allowed to justify ; ⁽²⁾ but if such defect is technical only, the defendant will merely be deprived of the costs of justification, and not ordered to pay the costs of the opposition.⁽³⁾ If the defendant give an amended notice of bail, he must also accompany it with another affidavit of justification, else he cannot obtain the costs of justification.⁽⁴⁾

“Whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent) the reasonable costs incurred by such prior notices, although the names of the persons intended to justify, or any of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected.”⁽⁵⁾ So if the bail do not justify after several notices vexatiously given, the court will compel the defendant, and sometimes the attorney, to pay the costs occasioned thereby to the plaintiff.⁽⁶⁾

Extending time to justify.—Where the bail, from sudden illness, or other unforeseen obstacle, cannot attend, or refuse to attend, the defendant's attorney should immediately apply to a judge at chambers for an extension of time, either to justify the same bail, or change, or add to, them ; and this should be done before the time for justification has expired.⁽⁷⁾ There must be an affidavit stating the facts. The summons should be for a stay of proceedings, as well as for further time to justify. The order being obtained, the defendant's attorney must serve it, and also a new notice of justification,⁽⁸⁾ and an affidavit of service should be ready

⁽¹⁾ *Grant's bail*, 3 Dowl. 165 ; 1 O. M. & R. 598.

⁽²⁾ *Jackson's bail*, 1 Dowl. 172 ; *ibid.* 179.

⁽³⁾ *Cartes's bail*, 5 Dowl. 577 ; *ibid.* 602 ; *Thomson's bail*, 2 Dowl. 50 ; *Heald's bail*, 3 Dowl. 423 ; *West v. Williams*, 3 B. & Ad. 345 ; 1 Dowl. 162 ; *Kibble v. Thorburn*, 2 M. & Sc. 359.

⁽⁴⁾ Tidd “New Rules,” 26

⁽⁵⁾ Rule Pr. 111, H. T. 1853.

⁽⁶⁾ *Aldiss v. Burgess*, 3 B. & Ald. 759 ; *Blundell v. Blundell*, 5 B. & Ald. 533.

⁽⁷⁾ *West's bail*, 1 Chitt. R. 96 ; *ibid.* 3, 288 ; *Gwillim v. Howes*, 2 Chitt. R. 107.

⁽⁸⁾ *Newton's bail*, 4 Dowl. 270.

when the time to justify arrives. When a judge grants the order, another judge at chambers will not interfere.⁽¹⁾ The effect of the order is to render it necessary for the bail to justify, though no notice of exception be given by the plaintiff.⁽²⁾ It sometimes happens that extended time is granted by the judge, at the time of justification, owing to some defect in affidavits or notices.⁽³⁾

Further time to inquire after bail.]—When notice of bail is accompanied by an affidavit of justification, the plaintiff, on giving one day's notice before the day appointed for justification to the defendant, may put off that time, for not more than three days, and all proceedings are stayed in the meantime.⁽⁴⁾ In other cases, if he has been misled by notices, or the answers of bail have been unsatisfactory, the judge will generally grant further time for inquiry. After obtaining it, however, he cannot raise any objection to the notice of bail,⁽⁵⁾ nor insist on notice of justification.⁽⁶⁾

Allowance of bail.]—Bail is not perfected until there has been served on the plaintiff's attorney a rule of allowance, which is obtained on presenting the judge's order at the Master's office. Until service of this rule, the plaintiff may proceed on the bail-bond, or against the sheriff; hence it is usual to serve notice immediately after justification so as to prevent this.⁽⁷⁾ The bail cannot make a motion to the court till they are allowed.⁽⁸⁾

Filing bail-piece.]—When the rule or order of allowance is served, the bail-piece is obtained from the judge's clerk and filed with one of the Master's, on showing him the rule of allowance. If the defendant do not file it, the plaintiff may do so, should he sue upon the recognizance. When the bail-piece is filed, it is entered on the recognizance roll, which is docketed and carried into the treasury chamber.

(1) *Tomlinson v. Harvey*, 2 Chitt. R. 83.

(2) *Turner v. Cary*, 7 East, 607; *Nunn v. Rogers*, 2 Chitt. R. 106; *R. v. Wilson*, 3 Dowl. 255.

(3) *Lofft*, 194; *Drabble v. Denham*, 2 Chitt. R. 92.

(4) Rule Pr. 96, H. T. 1853, *ante*, p. 823.

(5) *Foster's bail*, 2 Dowl. 586.

(6) Price N. Pr. 165.

(7) *Bignold v. Lee*, 1 B. & C. 285; *Ward v. Nethercote*, 7 Tunt. 145; 1 Chitt. R. 675; *R. v. Sheriff of Middlesex*, 2 Chitt. R. 99.

(8) See *Sharp v. Sheriff*, 7 T. R. 226; *Joyce v. Pratt*, 6 Bing. 371.

2. *Bail in the country.*

Where the bail reside more than ten miles from London or Westminster, they may justify before a country commissioner. For this purpose the chief and one of the puisne judges of either of the courts have power to appoint a person, who is not an attorney, as such commissioner, to take recognizances of bail in the same manner as such judges or a judge on circuit may act.⁽¹⁾ The bail may be so put in before a commissioner in a different county from where the arrest took place.⁽²⁾ Eight days are allowed for putting in bail, as in town cases ⁽³⁾

In the Queen's Bench and Exchequer, a bail-piece is made out on plain parchment; in the Common Pleas, the bail-piece is written at the foot of the writ, which is on parchment. The affidavit of justification is written on plain paper.⁽⁴⁾ The bail-piece and affidavit are taken along with the bail to the country commissioner, who takes the recognizance and signs the bail-piece; and the bail at the same time swear their affidavits of justification. An affidavit of the due acknowledgment of the recognizance or bail-piece is then sworn by the attorney before some commissioner⁽⁵⁾ of the court in which the action is brought. These affidavits are then sent with the bail-piece to the agent in town in time for giving notice of bail on the eighth day.

Transmitting and filing bail-piece.—When the recognizance or bail-piece and affidavit of its due taking are transmitted to one of the judges of the court, it has the same effect as if it had been taken *de bene esse* before one of the judges.⁽⁶⁾ “In the case of country bail, the bail-piece shall be transmitted and filed within eight days.”⁽⁷⁾ The

(1) 4 W. & M. c. 4, s. 1, s. 3.

(2) *Moore v. Kendrick*, 3 Bing. 603; *Levy v. Payne*, 3 M. & Sc. 870.

(3) *Grant v. Gibbs*, 3 Dowl. 409; 1 Hodg. 56.

(4) If the notice of bail is accompanied by an affidavit of the bail, the same rule as to costs applies as in town bail: see Rule Pr. 98, H. T. 1853, *ante*, p. 818. The affidavit should state the bail is worth the sum required, and not that he is possessed of so much money over and above his just debts, *Sampson's bail*, 1 Dowl. 605. See *ante*, p. 819. It should also state in the jurat the names of all the deponents, (*Wellings v. Marsh*, 11 Price, 509), and the place of swearing, *Webster's bail*, 1 Chitt. R. 10; *Id.* 495.

(5) The commissioner for taking bail will not do, *Salmon's bail*, McCl. & Y. 149; and if bail was put in before a judge on circuit, this affidavit is unnecessary, 4 W. & M. c. 4, s. 3.

(6) 4 W. & M. c. 4, s. 1.

(7) Rule Pr. 95, H. T. 1853.

bail-piece is filed by the agent in town taking it with the affidavits to the judge's chambers, where the clerk files them.

Notice of bail and justifying.]—Bail is held to be not put in until notice of bail has been served ; ⁽¹⁾ and notice is served on the eighth day after the arrest, inclusive of the day of the arrest, and a copy of the affidavit of justification is generally given at the same time. The form of notice and mode of serving it is the same as in the case of town bail.⁽²⁾ So is the mode of excepting to and justifying bail. The notice of justification states that bail will justify by affidavit. If the bail reside in London or Westminster, or within ten miles thereof, they must justify in person before a judge at chambers, as in town bail;⁽³⁾ but if residing elsewhere, they must justify by affidavit.⁽⁴⁾ When the bail is opposed, the judge will give time, if necessary, to answer the affidavits, but not so as to allow fresh bail to be put in.⁽⁵⁾

3. Putting in bail when defendant is in custody.

Where the defendant is in custody after the eight days from the arrest, he may put in and perfect special bail any time before he is charged in execution.⁽⁶⁾ It seems the bail-piece and notice of justification should state that the defendant is in custody, and where.⁽⁷⁾ Though notice of bail is accompanied by an affidavit of each of the bail, according to Rules Pr. 98, 99, H. T. 1853, which require a four days' notice and one day's notice of exception, a two days' notice of putting in and justifying is sufficient,⁽⁸⁾ and no notice of exception is required.⁽⁹⁾ Nor does it require the leave of the court or a judge to change bail, of whom notice has been given.⁽¹⁰⁾ Where one bail only justifies, time may be obtained that another may justify, but if neither justified, no time is required.⁽¹¹⁾

⁽¹⁾ *Grant v. Gibbs*, 1 Sc. 390 ; 3 Dowl. 409.

⁽²⁾ *Anon.* 1 Dowl. 259 ; *Beale's bail*, 3 Dowl. 708.

⁽³⁾ *Anon.* 1 Dowl. 293 ; 1 C. & J. 516.

⁽⁴⁾ *Ibid.* ; 4 W. & M. c. 4, s. 2.

⁽⁵⁾ *Cockburn v. Ling*, 6 Bing. 132 ; *Green v. Hartley*, 1 Chitt. B. 354.

⁽⁶⁾ *Barnes*, 92 ; see *ante*, p. 721.

⁽⁷⁾ *Crichton's bail*, 1 Cr. & M. 335 ; 1 Dowl. 609 ; *Bullen's bail*, 3 Dowl. 422.

⁽⁸⁾ *Davies v. Gray*, 2 Cr. & J. 309 ; *King's bail*, 1 Dowl. 509.

⁽⁹⁾ *Webb's bail*, 1 Dowl. 446.

⁽¹⁰⁾ *Bird's bail*, 2 Dowl. 583.

⁽¹¹⁾ *Foy's bail*, *id.* 442.

“ Every rule or order of a judge directing the discharge of a defendant out of custody, upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith, where defendant is in a county gaol.”⁽¹⁾ The *supersedeas*, written on plain parchment, is taken with the rule of allowance and bail-piece to the office of the court to be stamped, after which, on lodging the writ with the gaoler, he will discharge the defendant, if there is no other detainer against him.⁽²⁾ If the defendant is in the custody of the sheriffs of London or Middlesex, or in the Queen’s prison, the rule of allowance is sufficient authority to the keeper or gaoler to discharge the defendant.

4. *Paying Money into Court in lieu of Special Bail.*

Where the defendant has, under 43 Geo. 3, c. 46, s. 2, deposited the amount of the debt, and 10*l.* costs, in the hands of the sheriff, who has paid the sums into court, the defendant may, instead of putting in and perfecting special bail, allow the money to remain in court, and pay in another 10*l.*⁽³⁾ Or if he had not deposited any sum with the sheriff, he may pay into court the amount indorsed on the writ, and 20*l.* as a security for costs. The defendant must give notice of paying in the sum any time before the day for perfecting the special bail.⁽⁴⁾ He cannot, however, pay the additional 10*l.* into court until the sheriff has paid the deposit into court.⁽⁵⁾ To pay into the court the 10*l.* or 20*l.*, leave of the court is necessary, which is obtained on a motion paper signed by counsel, and a receipt being tendered to the Master with the money.⁽⁶⁾ The rule is then drawn up and served; and an appearance is also entered to the writ of summons. The defendant is then, if a bail-bond has been given, entitled to have it delivered up to be cancelled.⁽⁷⁾ The defendant may also apply to the court for an order to repay the money out of court, on putting in and perfecting special bail, or rendering⁽⁸⁾ and paying the plaintiff’s costs.⁽⁹⁾

(1) Rule Pr. 123, H. T. 1853.

(2) *Knowleys v. Reading*, 1 B. & P. 181.

(3) 7 & 8 Geo. 4, c. 71, s. 2.

(4) *Rowe v. Softly*, 6 Bing. 634; 4 M. & P. 464; *Stratford v. Love*, 3 Dowl. 593; *Stanforth v. McCann*, 4 Dowl. 367; 1 Gale, 344; see *Scherwinski v. Perronet*, 8 Dowl. 229, where it was paid in after the time for perfecting special bail had expired.

(5) *Hannah v. Willis*, 6 Dowl. 417.

(6) *Hunn v. Brine*, 6 Moore, 124; *Haines v. Nairn*, 2 Dowl. 43.

(7) *Smith v. Jordan*, 2 M. & P. 428.

(8) *Douglas v. Stanbrough*, 3 A. & E. 316.

(9) 7 & 8 Geo. 4, c. 71, s. 3.

and such application may be made any time before issue joined,⁽¹⁾ or before judgment,⁽²⁾ and the court will stay proceedings till the rule is disposed of.⁽³⁾ The court, however, will not convert the money into a payment into court under a plea of payment into court,⁽⁴⁾ nor under a plea of tender;⁽⁵⁾ nor will the court allow the money to be repaid on the ground of a defect in the affidavit to hold to bail.⁽⁶⁾ Where a third party has paid the deposit for the defendant, who afterwards renders, the court will repay the money to such third party on motion, if the defendant assents.⁽⁷⁾ The defendant may move for a rule that the plaintiff should take out of court part of the sum in full discharge of the action, otherwise such part to be struck out of the declaration, and no evidence thereof to be given at the trial.⁽⁸⁾ The defendant may, after perfecting special bail, on motion, obtain leave to pay the whole sum and costs into court; and the court then will direct a common appearance to be entered, and an *exoneretur* to be entered on the bail-piece.⁽⁹⁾

When judgment for plaintiff.]—Where judgment in the action is given for the plaintiff, or the suit is otherwise legally determined in his favour,⁽¹⁰⁾ he may apply to the court (not a judge at chambers)⁽¹¹⁾ to have the money paid out to him, even though it had been paid in by one of the bail.⁽¹²⁾ And the plaintiff is bound to make this money available in the first instance, and can issue execution only for the balance.⁽¹³⁾ And where the defendant duly deposits the money with the sheriff, which is paid into court, and neglects to take any further steps, the plaintiff is entitled to

(1) *Welchman v. Sturgis*, 13 Q. B. 552; *Hanwell v. Mure*, 2 Dowl. 155; *Ferrall v. Alexander*, 1 Dowl. 132; *Alcenous v. Nigreu*, 4 E. & B. 217.

(2) *Geach v. Coppin*, 3 Dowl. 78.

(3) *Bloor v. Cox*, 6 Dowl. 266.

(4) *Balls v. Stafford*, 4 Dowl. 327; 2 Sc. 428.

(5) *Stulz v. Heneage*, 2 Dowl. 806; 4 Bing. 561; 4 M. & Sc. 472.

(6) *Green v. Glassbrook*, 1 Bing. N. C. 516; 1 Hodg. 27.

(7) *Douglas v. Stanbrough*, 3 A. & E. 316; *Alcenous v. Nigreu*, 4 E. & B. 217.

(8) *Hubbard v. Wilkinson*, 8 B. & C. 496.

(9) 7 & 8 Geo. 4, c. 71, s. 4.

(10) *Johnson v. Wall*, 4 Dowl. 315; *Tuton v. Gale*, 1 Dowl. N. S. 383.

(11) *Smeaton v. Collier*, 5 D. & L. 184; 1 Exch. 547.

(12) *Bull v. Turner*, 1 M. & W. 47; 4 Dowl. 734.

(13) *Hewes v. Pike*, 1 Dowl. 322; 2 Cr. & J. 359.

take the amount (subject to taxation) out of court, without awaiting the final determination of the suit; ⁽¹⁾ and, if the defendant has left the country, the rule may be served by sticking it up in the rule office. ⁽²⁾ For this application a motion paper is given to counsel, with an affidavit that the money has been paid in, and he moves for a rule to show cause why all the money should not be paid out of court to the plaintiff, or so much thereof as is sufficient to satisfy the judgment and costs of the application. ⁽³⁾ When the money is insufficient, the court will make an order on the defendant to pay the costs of the application; ⁽⁴⁾ and where less was recovered than the amount for which bail was taken, but the costs increased it beyond the sum in court, it was held that the plaintiff was entitled to have the whole sum paid to him, and not merely the sum recovered together with 20*l.* costs. ⁽⁵⁾ When any surplus remains after paying the plaintiff's debt, the defendant can apply to have it repaid to him, ⁽⁶⁾ and it seems he ought to make a separate application for this purpose. ⁽⁷⁾

When judgment for defendant.—When the defendant succeeds in the action, or there is a surplus after paying the plaintiff's debt and costs, he may move the court for a rule to show cause why the money should not be repaid to him. ⁽⁸⁾ An affidavit should be made of the money having been paid in, and the judgment having been signed. When the rule is made absolute, the Master will pay out the money without being entitled to poundage. ⁽⁹⁾

5. Liability of Special Bail, how Discharged.

Bail how far liable.—“Bail shall only be liable to the sum sworn to by the affidavit of debt, and the costs of suit, not exceeding in the whole the amount of their recognizance.” ⁽¹⁰⁾

⁽¹⁾ *Nyssen v. Ruysenacrs*, 5 Exch. 857.

⁽²⁾ *Shackel v. Johnson*, 7 C. B. 865.

⁽³⁾ *Symes v. Rose*, 5 Bing. 269; *Lover v. Titmin*, 5 Dowl. 388.

⁽⁴⁾ *Freeman v. Pganini*, 4 M. & Sc. 165; 2 Dowl. 776.

⁽⁵⁾ *Welchman v. Sturgis*, 6 D. & L. 739.

⁽⁶⁾ 7 & 8 Geo. 4, c. 71, s. 2.

⁽⁷⁾ *Fowle v. Steinkeller*, 9 Dowl. 1037.

⁽⁸⁾ *Symes v. Rose*, 5 Bing. 269; 2 M. & P. 426; *Grant v. Willes*, 4 Dowl. 511; *Wild v. Rickman*, 1 H. & W. 670; *Lover v. Titmin*, 5 Dowl. 388.

⁽⁹⁾ *Hunn v. Brins*, 6 Moore, 124; *Haines v. Nairne*, 2 Dowl. 43; *Stewart v. Bracebridge*, 2 B. & Ald. 770.

⁽¹⁰⁾ Rule Pr. 109, H. T. 1853.

The "costs of suit" generally include the costs of an action against them,⁽¹⁾ except where notice of render has been given,⁽²⁾ but not the costs of proceedings in error brought by their principal.⁽³⁾ But to entitle bail to a stay of proceedings, pending a writ of error, the application must be made before the time to surrender is out.⁽⁴⁾ Where judgment has been recovered against the principal, the bail are not liable to pay interest thereon,⁽⁵⁾ though if the judgment were against themselves, they would.⁽⁶⁾ The bail continue liable as long as their names are on the bail-piece, even though they have failed to justify.⁽⁷⁾ On paying the above sums, the court or a judge will stay proceedings against the bail on the recognizance, though such sums be less than the damages recovered, or than the sum named in the process,⁽⁸⁾ or though the defendant in the original action has gone abroad.⁽⁹⁾ So, the court will enter an *exoneretur* on the bail-bond, on the same payment.⁽¹⁰⁾

Discharge by render.—When bail above is put in and justified, or put in and the principal rendered, the *bail to the sheriff* are discharged. This may happen immediately after the writ of *capias* is executed, as that writ is returnable immediately, or, if the sheriff has been ruled to return the body, the bail above may render the principal even after assignment of the bail-bond,⁽¹¹⁾ and proceedings taken thereon,⁽¹²⁾ though they have not justified. Where the plaintiff has proceeded against the sheriff, the principal must, in general, be rendered before the rule to bring in the body has expired.⁽¹³⁾

Any time during the action, the *bail above* are entitled, of right, to render the principal in their discharge, and

(1) *Hughes v Poidevin*, 15 East, 254.

(2) *Smith v. Lewis*, 16 East, 168; see *post*.

(3) *Yates v. Doughan*, 6 T. R. 288.

(4) Rule Pr. 110, H. T. 1863.

(5) *Waters v. Rees*, 3 Taunt. 503.

(6) 1 & 2 Vict. c. 110, s. 17.

(7) *Fulke v. Bourke*, 1 W. Bl. 462; *Logan v. Louel*, 6 Bing. 251; 3 M. & P. 594.

(8) *Clarke v. Bradshaw*, 1 East, 86; *Wheehoright v. Simmons*, 5 M. & Sel. 511.

(9) *Tranel v. Rivaz*, 1 East, 91 n.

(10) *Jacob v. Bowes*, 6 East, 312; Tidd, 280, (9th edit.)

(11) *Edwin v. Allen*, 5 T. R. 401.

(12) *Meysey v. Carnell*, 5 T. R. 534.

(13) *R. v. Sheriffs of London*, 1 Chitt. R. 567. See *Thorold v. Fisher*, 1 H. Bl. 9.

thereby release their liability,⁽¹⁾ and the court generally allows some time after the return of the *ca. sa.* for the bail to render the principal.⁽²⁾ Thus, "where the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period; [and that, upon such render being duly made,] and notice thereof given, the proceedings shall be stayed, upon payment of the costs of the writ, and service thereof only."⁽³⁾ The render is not in itself a stay of proceedings until the costs are paid.⁽⁴⁾ "Bail shall be at liberty to render the principal at any time during the last day for rendering, so as they make such render before the prison doors are closed for the night."⁽⁵⁾

Bail are entitled to seize their principal in order to render him,⁽⁶⁾ even on a Sunday,⁽⁷⁾ or though he is going, as a bankrupt, to surrender,⁽⁸⁾ and even to break any inner door of his house to take him;⁽⁹⁾ and one of the bail, it is said, must, after the defendant is taken, unless he consent to remain in some other person's custody, keep possession of him till he is rendered.⁽¹⁰⁾

Enlarging time to render.—The court, in general, refuses to enlarge the time for rendering the principal, even though the principal is too ill to be removed,⁽¹¹⁾ or has become a lunatic,⁽¹²⁾ or has been taken a prisoner of war.⁽¹³⁾ But it is otherwise if he has been banished,⁽¹⁴⁾ or impressed

(1) *Simmons v. Middleton*, 8 Mod. 341; 1 Wils. 270.

(2) *Wilmore v. Clark*, 1 Lord Raym. 156; *Anon.* 1 Salk. 101.

(3) Rule Pr. 108, H. T. 1853. The words in brackets were in the previous rule, 3 T. T. 3 W. 4, and have been omitted, obviously by some clerical error.

(4) *Horn v. Whitcombe*, 5 Dowl. 328.

(5) Rule Pr. 105, H. T. 1853.

(6) *R. v. Butcher*, Peake, 169; *Birt v. Roberts*, 1 M. & M. 177; *Pyswell v. Stow*, 3 Taunt. 525. See *Taylor v. Evans*, 1 Bing. 367.

(7) *Anon.* 6 Mod. 231. But see *Brooks v. Warren*, 2 W. Bl. 273.

(8) *Ex parte Gibbons*, 1 Atk. 238; *Ex parte Leigh*, 1 Gl. & J. 264.

(9) *Sheers v. Brooks*, 2 H. Bl. 120.

(10) 1 Sellon, 170.

(11) *Wynn v. Petty*, 4 East, 102; *Grant v. Fagan*, *id.* 190. But if he is already in custody, and ill, it may be otherwise, *Winstanley v. Gaitskell*, 16 East, 389.

(12) *Cock v. Bell*, 13 East, 355. But see *Pillop v. Sexton*, 3 B. & P. 550.

(13) *Grant v. Fagan*, 4 East, 189.

(14) *Folkeis v. Critico*, 13 East, 457; *Wood v. Mitchell*, 6 T. R. 247; *Fowler v. Dunn*, 4 Burr. 2034.

into the Queen's service,⁽¹⁾ or, perhaps, if he has become bankrupt in the country,⁽²⁾ or is in *quasi* criminal custody as a bankrupt,⁽³⁾ or is undergoing imprisonment for a libel.⁽⁴⁾ In general, the bail cannot make an application to enlarge the time until they justify, unless the principal is already in custody;⁽⁵⁾ and it must distinctly appear that the application is on the behalf of the bail.⁽⁶⁾

If defendant in prison.]—If the defendant is, at the time, in custody on a civil suit, as the custody of the gaoler of the county gaol of any county in England or Wales, by virtue of any proceeding out of any of the superior courts, he may be rendered in discharge of his bail in any other action depending in any of the said courts in the ordinary manner; and the keeper of such gaol, or such sheriff, or other person responsible for the custody of debtors, shall, on such render, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such.⁽⁷⁾ So by Rule Pr. 107, H. T. 1853, "if a defendant shall be in custody of the gaoler of any county gaol, by virtue of any process issued out of any of the said courts, he may be rendered in discharge of his bail in any action depending in the said court, in like manner as is provided by Rule Pr. 106 (*post*, p. 837); and, thereupon, the bail shall be wholly exonerated without entering any *exoneretur*."

If the defendant is in custody under *criminal* or *Crown* process, the bail must apply to the Queen's Bench for a *habeas corpus* to bring him up to be rendered, as where he is under a charge of felony,⁽⁸⁾ or under a sentence of transportation not carried into effect.⁽⁹⁾ So, if he is committed

(1) *Robertson v. Patterson*, 7 East, 406.

(2) *Maude v. Gouett*, 3 East, 145; *Offley v. Dickens*, 6 M. & Sc. 341; *Glendinning v. Robinson*, 1 Taunt. 320. As to a bankruptcy in town, see *Ruston v. Green*, 2 Dowl. 617; *Coombes v. Dod*, *id.* 766; 3 M. & Sc. 817; *Shaw v. Cash*, 4 Bing. 80; 12 Moore, 257.

(3) *Gibson v. White*, 1 Dowl. 297; 2 Cr. & J. 85; *Harris v. Alcock*, 2 Cr. & J. 486; *Waugh v. Ashford*, 3 Dowl. 123; 1 Sc. 167.

(4) *Campbell v. Ackland*, 1 Cr. & M. 73; 1 Dowl. 635.

(5) *Golding v. Haverfield*, 13 Price, 593; *Bird v. Atkins*, 7 Dowl. 769.

(6) *Harris v. Glossop*, 2 Chitt. R. 101.

(7) 11 Geo. 4 & 1 Will. 4, c. 70, s. 22.

(8) *Sharp v. Sheriff*, 7 T. R. 226; *Daniel v. Thompson*, 15 East, 78. See *ante*, p. 732.

(9) *Vergen's case*, 2 Str. 1217; *Joyce v. Pratt*, 6 Bing. 377; 4 M. & P. 55; *Folkein v. Critico*, 18 East, 457.

by a bankruptcy commissioner, ⁽¹⁾ or confined as a lunatic in an hospital. ⁽²⁾

Putting in special bail before rendering.]—Before the render can be made, special bail must be put in, either by the defendant or the sheriff, or the bail below; or where the bail put in by the defendant have failed to justify, other bail put in by the sheriff, or his bail, may then render the defendant. ⁽³⁾ “Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.” ⁽⁴⁾ Bail may render without justifying, ⁽⁵⁾ and if one of the bail only justifies, he and the other may render the principal. ⁽⁶⁾

To what prison, and how rendered.]—“A defendant, who shall have been held to bail upon any *mesne* process, issued out of any of his Majesty’s superior courts of record, may be rendered in discharge of his bail, either to the prison of the court out of which such process issued, according to the practice of such court, or to the common gaol of the county in which he was so arrested, and the render to the county gaol shall be effected in the manner following, that is to say: the defendant, or his bail, or one of them, shall, for the purpose of such render, obtain an order of a judge of one of his Majesty’s superior courts at Westminster, and shall lodge such order with the gaoler of such county gaol; and a notice in writing, of the lodgment of such order, and of the defendant being actually in custody of such gaoler by virtue of such order, signed by the defendant, or the bail, or either of them, shall be delivered to the plaintiff’s attorney or agent; and the sheriff or other person responsible for the custody of debtors in such county gaol shall, on such render so perfected, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such.” ⁽⁷⁾ “On application, by a defendant or his bail, or either of them, for an order to render a defendant to a county gaol, it shall be specified on

⁽¹⁾ *Waugh v. Ashford*, 3 Dowl. 123; 1 Bing. N. C. 294.

⁽²⁾ *Phillip v. Saxton*, 2 B. & P. 550.

⁽³⁾ *Bircher v. Colson*, 2 Str. 876. See *Taylor v. Evans*, 8 Moore, 398; 1 Bing. 367.

⁽⁴⁾ Rule Pr. 104, H. T. 1858.

⁽⁵⁾ *Wiggins v. Stephens*, 5 East, 533.

⁽⁶⁾ *Mills v. Head*, 1 N. R. 138 n.

⁽⁷⁾ 11 Geo. 4 & 1 Will. 4, c. 70, s. 21.

whose behalf such application shall be made, the state of the proceedings in the cause, for what amount the defendant was held to bail, and by the sheriff of what county he was arrested, which facts shall be stated in the order; and that on such order being lodged with the gaoler of the county gaol in which such defendant was so arrested, the defendant may be rendered to his custody in discharge of the bail; and that, on such lodgment and render, a notice thereof, and of the defendant's being actually in custody thereon, in writing, signed by the defendant or his bail, or either of them, or the attorney or agent of any or either of them, shall be delivered to the plaintiff's attorney or agent, and thereupon the bail for the said defendant shall be wholly exonerated, without entering any *exoneretur*."⁽¹⁾ If the defendant had escaped, and was re-taken on an escape warrant and lodged in the county gaol, the sheriff is bound to detain him, on the bail directing to him a writ to that effect, and delivery of this writ is deemed an effectual render.⁽²⁾

The render of a defendant, who is at large, to the Queen's prison, consists in taking⁽³⁾ him to the judge's chambers, when a memorandum of the state of the cause must be given to the judge's clerk,⁽⁴⁾ who will make out a render and commitment, and deliver the defendant to the tipstaff, who will give a certificate of the custody. The judge will then exonerate the bail. An attorney's presence is not absolutely necessary at the render.⁽⁵⁾

Notice of render and stay of proceedings.—After the render, the defendant or his attorney must forthwith give notice of the fact to the plaintiff, upon which "proceedings shall be stayed, on payment of the costs of the writ and service thereof only;"⁽⁶⁾ but it is the defendant's business to apply to stay the proceedings.⁽⁷⁾ This application may be made even after proceedings had, and execution levied

(1) Rule Pr. 106, H. T. 1853.

(2) 1 Anne, c. 6, s. 3.

(3) This seems not essential in the Queen's Bench, *Davis v. Fowler*, 2 Chitt. R. 74.

(4) In the C. P. and Exch., notice should previously be given to the Master to attend with his book.

(5) *Nethersole's bail*, 2 Chitt. R. 269.

(6) Rules Pr. 106, 108, *ante*, p. 835.

(7) *Horn v. Whitcombe*, 5 Dowl. 328.

against the bail;(1) but, generally, only on payment of costs.(2)

Entering exoneretur on the bail-piece.—In order completely to discharge the bail, it is absolutely necessary, except, as before mentioned, in the case of a render to a county gaol, to have an *exoneretur* entered on the bail-piece.(3) But if the omission is due to the neglect of the attorney, the court may set aside subsequent proceedings against the bail on payment of costs.(4) On applying for the *exoneretur*, an affidavit must be produced of the service of notice of render, and also the certificate of the tipstaff, that he has the defendant in custody. On showing the affidavit to the judge's clerk or the Master, he will give out the bail-piece, which is then taken, with the certificate, to one of the Masters, who will enter the *exoneretur* on the bail-piece. The bail-piece is then filed with the Master. After the *exoneretur* has been ordered to be entered, it is irregular to proceed against the bail though not actually entered.(5) The court may rescind the order to enter the *exoneretur*, if the consent was given under a mistake.(6)

Discharge by death, bankruptcy, &c., of principal.—The death of the principal, before the return of the *ca. sa.* issued against him, discharges the bail, who may either apply to a judge or the court to enter an *exoneretur*, or may plead the death to the *scire facias* on the recognizance.(7) If, however, the principal die after the *ca. sa.* is returnable, the bail are not discharged.(8)

So, the bail are discharged if the principal has obtained his certificate as a bankrupt,(9) or discharge as an insol-

(1) *Lepine v. Barratt*, 8 T. R. 222; *Thorn v. Hutchinson*, 3 B. & C. 112; 4 D. & R. 712.

(2) See *Smith v. Lewis*, 16 East, 168; *Cresswell v. Hearne*, 1 M. & Sel. 742; *Brookhouse v. Sheriff of Derbyshire*, 5 B. & C. 244.

(3) *Wild v. Harding*, 8 Mod. 282, 340.

(4) *Weaver v. Chandler*, Sayer, 7; *Knight v. Winter*, Barnes, 68. See where the plaintiff's attorney neglected to file the bail-piece, *Wild v. Harding*, 8 Mod. 280.

(5) *Bond v. Isaac*, 1 Burr. 409.

(6) *Firth v. Harris*, 8 Dowl. 437.

(7) *Sparrow v. Lowgate*, 2 Jur. 29; Tidd, 1129 (9th edit.)

(8) *Glyn v. Yates*, 1 Str. 511; *Filewood v. Popplewell*, 2 Wils. 65; *Rawlinson v. Gunston*, 6 T. R. 284.

(9) *Johnson v. Linsey*, 1 B. & C. 247; *Payne v. Spencer*, 6 M. & S. 231; *West v. Ashdown*, 1 Bing. 164.

vent; ⁽¹⁾ and these may apply for an *exoneretur* ⁽²⁾ as they cannot plead such a defence. ⁽³⁾ The application must be prompt, ⁽⁴⁾ and if not before proceedings taken against the bail, they must pay the costs. ⁽⁵⁾ The certificate of bankruptcy has the same effect as an actual render. ⁽⁶⁾

If the plaintiff give time to the principal without the consent of the bail, ⁽⁷⁾ or, perhaps, of one of them, they will be discharged on prompt application; ⁽⁸⁾ as where the plaintiff takes a *cognovit* from the principal, having the effect of extending the time to pay the debt and costs: ⁽⁹⁾ or takes the joint bills of the principal and some other person, having the effect of extending the time; ⁽¹⁰⁾ or agrees to a composition. ⁽¹¹⁾ But the bail will not be relieved where the plaintiff was under a mere moral obligation to give time to the principal, ⁽¹²⁾ or had proceeded in equity, ⁽¹³⁾ and the Court of Equity stayed the action by injunction. ⁽¹⁴⁾

The bail are also discharged if the action is referred to arbitration, ⁽¹⁵⁾ or the judgment is for the defendant, ⁽¹⁶⁾ or execution issues against the defendant for the debt; ⁽¹⁷⁾ also if

⁽¹⁾ *Anon. v. Bruce*, 2 Chitt. R. 105; *Todd v. Mayfield*, 3 B. & C. 222; 5 D. & R. 258. If the bankruptcy be disputed, the court will order a feigned issue to be tried, *Harmer v. Hagger*, 1 B. & Ald. 332.

⁽²⁾ *Ibid.*; *Martin v. O'Hara*, Cowp. 824.

⁽³⁾ *Donnelly v. Dunn*, 2 B. & P. 45.

⁽⁴⁾ *Swayne v. Bland*, 4 D. & R. 373; *Humphreys v. Knight*, 4 M. & P. 370; 6 Bing. 569.

⁽⁵⁾ *Manning v. Partridge*, 14 East, 599; *Thackeray v. Turner*, 8 Taunt. 28.

⁽⁶⁾ *Jones v. Ellis*, 1 A. & E. 382.

⁽⁷⁾ *Howard v. Bradbery*, 3 Dowl. 92.

⁽⁸⁾ *Vernon v. Turley*, 1 M. & W. 316.

⁽⁹⁾ *Farmer v. Thorneley*, 4 B. & Ald. 91. But if time is not given by the *cognovit* to the plaintiff (*Stevenson v. Roche*, 9 B. & C. 707). or if the bail consent to the *cognovit*, they remain liable, in which case, however, they should receive notice that the *cognovit* is unsatisfied before proceedings are taken against them: (*Clift v. Gye*, 9 B. & C. 422; *Surman v. Bruce*, 4 M. & Sc. 184.)

⁽¹⁰⁾ *Willison v. Whittaker*, 7 Taunt. 53. See where the time was not extended thereby, *Melville v. Glendinning*, 7 Taunt. 126; *Vernon v. Turley*, 1 M. & W. 316; 4 Dowl. 660.

⁽¹¹⁾ *Thackeray v. Turner*, 8 Taunt. 28.

⁽¹²⁾ *Ladbroke v. Hewett*, 1 Dowl. 488.

⁽¹³⁾ *Murphy v. Cadell*, 2 B. & P. 137.

⁽¹⁴⁾ *Horsley v. Walstab*, 7 Taunt. 235.

⁽¹⁵⁾ *Archer v. Hale*, 4 Bing. 464; 1 M. & P. 285.

⁽¹⁶⁾ But though the plaintiff recover less than £20, the bail will not be discharged, *Thwaites v. Piper*, 4 D. & R. 194.

⁽¹⁷⁾ *Higgin's case*, Cro. Jac. 320; *Gee v. Fane*, 1 Lev. 226; *Gubbs v. Blackwell*, 2 Lutw. 1273.

the defendant become a peer,⁽¹⁾ or member of the House of Commons,⁽²⁾ or be transported, so that it is impossible to render him.⁽³⁾ But the court will not discharge the bail if the defendant is detained by an enemy abroad,⁽⁴⁾ or becomes a lunatic.⁽⁵⁾

Discharge by variance between the writ and declaration.—In many cases the court discharged the bail where there was a material variance between the declaration and the writ of *capias*, as in the number of plaintiffs,⁽⁶⁾ or defendants.⁽⁷⁾ So, in many cases, where the variance was between the declaration and the affidavit to hold to bail as to the cause of action,⁽⁸⁾ or as to the number of defendants.⁽⁹⁾ In such cases, the principle seems to be whether the bail undertook, by their recognizance, to be responsible in the altered circumstances.

6. Proceedings against the Bail.

Suing out ca. sa. against the defendant.—Before proceeding against the bail, a *ca. sa.* must have been sued out against the principal and returned, that being the only mode of informing the bail what kind of execution is to be resorted to against him.⁽¹⁰⁾ The *ca. sa.* must be directed to the sheriff,⁽¹¹⁾ and the writ may be tested and returnable on vacation.⁽¹²⁾ The writ must be made returnable on a day certain, and it is sufficient that there be eight days between

(1) *Trinder v. Shirley*, 1 Doug. 45.

(2) *Phillip v. Wellesley*, 1 Dowl. 9.

(3) *D'Argent v. Wilson*, 1 East, 380; *Merrick v. Vacher*, 6 T. R. 50; *Coles v. DeHayne*, 6 T. R. 246.

(4) *Grant v. Fagan*, 4 East, 189.

(5) *Ibbotson v. Galway*, 6 T. R. 133.

(6) *Rogers v. Jenkins*, 1 B. & P. 383.

(7) *Bertram v. Williams*, 6 Dowl. 397; *Thompson v. Cotter*, 1 M. & Sel. 55; *Woodcock v. Kilby*, 1 M. & W. 41; 4 Dowl. 730.

(8) 2 Saund. 72 a; *Tetherington v. Goulding*, 7 T. R. 80; *Vernon v. Turley*, 1 M. & W. 326; *Firth v. Harris*, 8 Dowl. 689; *Wheelwright v. Jutting*, 7 Taunt. 304. See where a new count was added, and the plaintiff recovered only on that count, *Thompson v. Macerons*, 3 B. & C. 1; 4 D. & R. 619. See also *Taylor v. Wilkinson*, 6 A. & B. 533; *Phillips v. Don*, 6 D. & L. 527.

(9) *Grindall v. Smith*, 1 M. & P. 24; *Christie v. Walker*, 1 Bing. 68.

(10) *Thackeray v. Harris*, 1 B. & Ald. 212; *Hunt v. Cox*, 3 Burr. 1360.

(11) 2 Saund. 72 a; *Galway v. Laporte*, 4 Dowl. 639; 2 Bing. N. C. 456.

(12) C. L. P. Act, 1854, s. 90.

the teste and the return.⁽¹⁾ "A writ of *ca. sa.* to fix bail shall have eight days between the teste and the return, and must, in London and Middlesex, be entered four clear days in the public book at the sheriff's office."⁽²⁾ It seems the writ must also, in other cases, lie four days in the sheriff's office before proceeding against the bail.⁽³⁾ These four days must be juridical days.⁽⁴⁾ If not so entered, the court may set aside the proceedings against the bail.⁽⁵⁾ If there is any irregularity in the *ca. sa.*, the bail may apply to the court to set aside the *ca. sa.*,⁽⁶⁾ if it is done promptly.⁽⁷⁾ The bail, however, cannot take advantage of an irregularity in the judgment against the principal.⁽⁸⁾ A *ca. sa.* should not be sued out, after the defendant has rendered.⁽⁹⁾ The sheriff merely returns *non est inventus* to the writ, without executing it, and this return is good, though the plaintiff knew where to find the defendant, unless he be already in the custody of the sheriff, either on civil or criminal account.⁽¹⁰⁾ The *ca. sa.* should be filed with the Master as soon as it is returned.⁽¹¹⁾

Filing bail-piece.]—After the *ca. sa.* has been returned and filed, the bail-piece should be filed as stated, *ante*, p. 828.

Entry of recognizance on roll.]—The recognizance required under the old practice to be entered on the roll, and it seems this is still necessary.⁽¹²⁾

Sci. fa. against bail.]—The plaintiff may either proceed against the bail by action on the judgment, or by *scire facias* on the recognizance. A *sci. fa.* is tested, directed, and proceeded on in like manner as a writ of revivor.⁽¹³⁾ It must

(1) Rule Pr. 74, H. T. 1853.

(2) Rule Pr. 75, H. T. 1853.

(3) *Furnell v. Smith*, 7 B. & C. 693.

(4) *Howard v. Smith*, 1 B. & Ald. 528; *Scott v. Larkins*, 4 M. & P. 748; 7 Bing. 109.

(5) *Hutton v. Reuben*, 5 M. & Sel. 323; 2 Chitt. R. 102.

(6) *Galway v. Laporte*, 4 Dowl. 639; 2 Bing. N. C. 456; *Gawker v. Jolly*, 1 H. Bl. 74.

(7) *Pocock v. Cockerton*, 7 Dowl. 21.

(8) *Haywood v. Ribbans*, 4 East, 310.

(9) *Saunderson v. Parker*, 9 Dowl. 495.

(10) 2 Tidd, Pr. 1147.

(11) 2 Sellon, 46; *Hunt v. Cox*, 3 Burr. 1360.

(12) See Chitt. Arch. (8th edit.) 800, 801.

(13) C. L. P. Act, 1852, s. 132. See *post*, "Revivor" and "*Sci. fa.*"

be sued out within ten years after the then session of Parliament, or twenty years after the cause of action.⁽¹⁾

Action against bail.—The plaintiff may sue the bail jointly, or in separate actions,⁽²⁾ and may issue the writ of summons on the return day of the *ca. sa.*⁽³⁾ The defendant cannot be held to bail.⁽⁴⁾

Execution against bail.—Where an action has been brought against the bail, the plaintiff may issue execution as usual. If the action was against both the bail jointly, then execution must be against both jointly.⁽⁵⁾ Where part has been levied by *f. fa.*, a *ca. sa.* may be issued for the residue.⁽⁶⁾ If the principal has been taken in execution, his bail cannot also be taken.⁽⁷⁾ So, if bail has been taken on a *ca. sa.*, the principal cannot afterwards be taken; though it is otherwise as to other writs of execution.⁽⁸⁾

If the bail were proceeded against by *sci. fa.*, the execution may either be against both bail jointly, or each severally.⁽⁹⁾

(a) *Bail in error.*—Bail in error are not discharged by the rendering of the principal, or his bankruptcy or insolvency, or on his being taken on a *ca. sa.*⁽¹⁰⁾ It is not, therefore, necessary to sue out a *ca. sa.* against the principal before proceeding against the bail in error. In other respects the proceeding against bail in error is the same as against bail to the action.

(1) 3 & 4 Will. 4, c. 42, s. 3.

(2) *Stevenson v. Grant*, 2 N. R. 103.

(3) *Shivers v. Brooks*, 8 T. R. 628.

(4) *Brandon v. Robson*, 6 T. R. 336; *Ormond v. Brierley*, 1 Salk. 99.

(5) *Clarke v. Clement*, 6 T. R. 525; *Raynes v. Jones*, 9 M. & W. 104; 1 Dowl. N. S. 373.

(6) *Stevenson v. Roche*, 9 B. & C. 707.

(7) *Higgins' case*, Cro. Jac. 820. See *Perkins v. Pettit*, 2 B. & P. 440.

(8) *Ibid.*; *Felgate v. Mole*, 1 Sid. 107; *Allen v. Snow*, 2 M. & Sel. 341.

(9) 2 Saund. 72 b; *Sainsbury v. Pringle*, 10 B. & C. 751.

(10) Loft, 238; *Southcole v. Braithwaite*, 1 T. R. 624; *Perkins v. Pettit*, 2 B. & P. 440; C. L. P. Act, 1852, s. 151, *ante*, p. 554.

CHAPTER XVIII.

BAIL—ARREST UNDER ABSCONDING DEBTORS
ARREST ACT.

THE Absconding Debtors Arrest Act, 1851 (14 & 15 Vict. c. 52), provides a more expeditious and efficacious mode of obtaining process for the arrest of debtors about to quit England, in all cases where such debtors are now liable in law to be arrested.

By sect. 1 it is enacted that—

It shall be lawful for any commissioner of the Court of Bankruptcy, acting for any district in the country, or the judge of any district County Court, except the County Court judges acting in the counties of Middlesex and Surrey, on application by, or on behalf of any creditor, *upon due proof by affidavit*, intituled in one of Her Majesty's superior courts of common law, of the creditor applying, or of some other person, or by solemn affirmation in cases in which solemn affirmation is allowed by law, to the satisfaction of such commissioner or judge, that a debt of 20*l.* or upwards is owing to such creditor, and is then payable from the person or persons against whom such application shall be made, and that there is probable cause for believing that such debtor or debtors, unless he or they be forthwith apprehended, is or are about to quit England, with intent to avoid or delay the said creditor, or with intent to remain out of the jurisdiction of the courts of law in England so long that thereby the said creditor will or may be delayed in the recovery of the said debt, *to grant a warrant*, such warrant being in the form and indorsed in the manner specified in the sched. A. to this act annexed, or to the like effect, to the messenger of the said Court of Bankruptcy, or to the high bailiff of the said County Court, whereby the said messenger or high bailiff shall have authority at any time, *within seven days* after the date of the said warrant, including the day of such date, *to arrest* the person or persons named in such warrant, and him or them safely keep until he or they shall have given bail to such messenger or high bailiff, or made deposit with him according to the practice observed in the superior courts of law, or until he shall have paid the debt and costs indorsed on the said warrant, or be otherwise

discharged from arrest under such warrant by due course of law, and that such warrant shall bear date the day of issuing thereof, and may be executed in any part of England, and that a copy of such warrant or warrants shall, at the time of the arrest, be served upon the party arrested : provided always, that every creditor who shall cause such warrant to issue, shall forthwith cause to be issued a writ of *capias*, and also, in cases where no action shall be pending, shall, *before* the issuing of such writ of *capias*, cause a *writ of summons* to be issued out of some one of the superior courts of law against such debtor or debtors, and that upon such *capias* all mandates and warrants shall issue according to the practice now in use, notwithstanding that the defendant shall have been arrested by virtue of any warrant or warrants granted by such commissioner or judge, and such debtor or debtors shall, if in custody, be served⁽¹⁾ with such writ of *capias*, within seven days from the date of such warrant, including the day of such date ; and thereupon such debtor or debtors shall be considered and deemed to have been arrested by virtue of the said writ of *capias*, and all proceedings shall be had upon such writ of *capias*, as if the same had been issued prior to the issuing of such warrant, and the arrest made on such writ of *capias*, and according to the practice now observed in the said superior courts of law.

Form of Warrant to Arrest. (Sched. A.)

Whereas, A. B. (*the creditor*) hath this day proved upon oath [*or solemn affirmation, as the case may be*] to my satisfaction, that C. D., (*the debtor*) is indebted to the said A. B. in the sum of £ , and that there is probable cause for believing that the said C. D., unless he be forthwith apprehended, is about to quit England with such intent as is mentioned in the Absconding Debtors Arrest Act, 1851. These are to desire and authorize you that you take the said C. D. wheresoever he may be found, and him safely keep until he shall have given you bail or made deposit with you, according to law in an action [*on promises, or of debt, or covenant, as the cause of action may be*] at the suit of A. B., or until the said C. D. shall have paid the debt and costs indorsed on this warrant, or shall by other lawful means be discharged from your custody. I do further command you to whom this warrant is directed, that on execution hereof you do deliver a copy hereof to the said C. D. And I hereby require the said C. D. to take notice that application will be made forthwith to the Court of Queen's Bench [*or Common Pleas, or Exchequer, or Common Pleas at Lancaster, or*

⁽¹⁾ If the defendant has paid the debt, and obtained his discharge, and is then arrested by other creditors, he need not be served with the *capias*, but it is sufficient to sue it out, *Eld v. Vero*, 8 Exch. 655. The *capias* must be issued and served within seven days, if issued on the same materials as the warrant, else the defendant may be discharged ; but if a *capias* is obtained on fresh materials afterwards, it will be valid, *Masters v. Johnson*, 8 Exch. 63.

Pleas at Durham, *as the case may be*] for a writ of *capias* to be issued against the said C. D., and a copy of such writ, if obtained, will be served upon the said C. D., if still in custody, within seven days from the date of this warrant, including the day of such date. And I do farther command you to whom this warrant is directed, that immediately after the execution hereof, you do certify by indorsement hereon the time and place, when and where you shall have executed the same. Dated the day of , A.D. .

This warrant is to be executed within days from the date hereof, including the day of such date, and not afterwards.

(*Indorsement.*)

This warrant was issued by , of , attorney for the within-named .

A Warning to the Defendant.

Within seven days from the day of the date of this warrant, including the day of such date, you will be served with a writ of *capias*, and thereafter you will be considered as arrested by virtue of such writ of *capias*, and all proceedings will be had upon the said writ of *capias* as if this warrant had not issued, or you may be discharged forthwith, on depositing in the hands of the officer to whom this warrant is directed the sum of £ , and ten pounds for costs, or on payment to such officer of the debt and costs indorsed on this warrant, or on entering into a bail-bond to such officer with two sufficient sureties for the amount indorsed on this warrant.

The plaintiff claims £ , by order of (*the party issuing the warrant.*)

The affidavit may be sworn before a commissioner of bankruptcy, or judge of the County Court, or any person having authority to administer oaths in the superior court: (s. 2.) The warrant is auxiliary only to the processes now in use, and shall be wholly void and of none effect whatsoever as a protection to the person issuing it, unless issued and served as aforesaid: (s. 3.) The person executing the warrant must indorse a certificate thereupon of the time and place where the arrest was made, and the production of this certificate is sufficient authority to the sheriff of the county where the warrant issued, or keeper of the county gaol, to detain the debtor: (s. 4.) The person executing the warrant is responsible to the court in which the action shall be brought, or a judge thereof, in the same manner as sheriffs now are, and is entitled to the same protection: (s. 9.) The person arrested may, before the issuing of the writ of *capias*, pay the debt and costs indorsed to the messenger or

bailiff, or enter into a bail-bond to him, with two sureties, for the amount indorsed, conditioned to put in special bail, as required by the said warrant, or to make deposit of the sum indorsed, together with ten pounds for costs, and thereupon he shall be entitled to be discharged from custody : (s. 5.)

Proceedings after arrest.—As soon as the person so arrested as aforesaid has been taken into custody, or detained under the writ of *capias* hereinbefore mentioned, the force and effect of the said warrant so granted as aforesaid shall immediately cease and determine, and the said sheriff shall hold the said person under or by virtue of the said writ of *capias*, in like manner as if the said person had been first arrested under and by virtue of the same, or in case the person so arrested shall have made deposit with the said messenger or high bailiff as aforesaid, or entered into such bail-bond as aforesaid, then upon delivery to the messenger or high bailiff respectively, by whom such person was arrested, of a copy of the warrant granted by the sheriff upon such writ of *capias* as aforesaid, the said messenger or high bailiff shall pay over to such sheriff as aforesaid the said deposit, or assign to the said sheriff such bail-bond as aforesaid, and the said sheriff shall then hold the said deposit or bail-bond, and shall be entitled to enforce the said bail-bond in his own name, or to assign the same in the same manner as if the said person had been first arrested on the said writ of *capias*, and the said deposit had been made or bail-bond entered into with the said sheriff; provided always, that the said sheriff shall not be in any manner liable or answerable for any default, misbehaviour, or miscarriage of the person to whom such warrant was addressed, or of the person or persons making the arrest under and by virtue of the said warrant; provided also, that if no writ of *capias* be issued and served⁽¹⁾ within seven days from the date of the said warrant, including the day of such date, the person arrested under such warrant shall be entitled to be discharged from custody, or, in case the deposit has been made with a bail-bond given to the said messenger or high bailiff, then the said deposit shall be returned, and the said bail-bond given up to be cancelled : (s. 6.)

Staying proceedings and applying for discharge.—Such

(¹) See *Eld v. Vero*, 8 Exch. 656, ante, p. 845.

warrant shall be indorsed with the amount of debt and costs claimed by the plaintiff, in such manner as writs of *capias* are now directed to be indorsed, and, on payment of the amount so indorsed, all proceedings shall be stayed and the person so arrested be discharged from custody, and he shall be at liberty afterwards to tax the costs so indorsed, as if he had been arrested under a writ of *capias*: (s. 7.) Also the person against whom a warrant has been granted may, either before or after arrest and before a *capias* has issued, apply to the commissioner or County Court judge, or a judge of the superior court, or the court mentioned in the affidavit, "for a summons or rule, calling upon the creditor who shall have obtained such warrant to show cause why the warrant should not be set aside and vacated, if such application shall be made before arrest, or why the debtor should not be discharged out of custody, if the application should be made after arrest, and it shall be lawful for such commissioner or judge, or court, to make absolute or discharge such summons or rule, and direct the *costs of the application* to be paid by either party, or to make such other order therein as to such commissioner, judge, or court shall seem fit: provided that any such order made by a judge may be discharged or varied by the court on application made thereto by either party dissatisfied with such order:" (s. 8.)

Costs and fees.]—The *costs of and attending the warrant* hereby authorized to be issued, and the arrest thereon, shall be deemed to be costs in the cause: provided always, that no such costs shall be allowed to a plaintiff, unless the court or the proper officer thereof is satisfied, by affidavit or otherwise, that the plaintiff had good reason to believe that he would probably have failed in causing the defendant to be arrested if he had proceeded, in the first instance, by application to a judge of one of the superior courts for a writ of *capias*, without first applying to a judge of a County Court or a commissioner of the Court of Bankruptcy, as the case may be, under the provisions of this act: (s. 10.)

The *costs of the writs of capias and summons* shall be the same as if this act had not passed: (s. 11.)

The fees following shall be paid to the parties named, and no other fees shall be allowed or taken in respect of the *warrant*: (s. 11.)

	£	s.	d.
To the attorney for preparing the affidavit of debt			
and showing that the debtor is about to abscond,			
and oath	0	10	0

	£	s.	d.
To the same, for attending to issue the warrant	0	6	8
To the clerk of the County Court, on the issuing of a warrant	0	5	0
To the party executing the warrant for the caption	1	1	0
To the same, for every mile from the place where the warrant shall be issued to the place where it shall be executed, a further sum of ...	0	0	6
To the same, for every mile from the place where the debtor shall be arrested to the gaol where he shall be lodged, the further sum of ...	0	1	0

CHAPTER XIX.

DISCONTINUANCE—NOLLE PROSEQUI—NON PROS.

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|--------------------|-------------------------------|
| 1. Discontinuance. | 5. Remittitur Damna. |
| 2. Cassetur Breve. | 6. Compounding Penal Actions. |
| 3. Nolle Prosequi. | 7. Judgment of Non Pros. |
| 4. Retraxit. | |

1. *Discontinuance.*

WHERE the plaintiff has reason to think he will not succeed in his action, he may discontinue it. Formerly the steps in an action were connected by continuances, but now "no entry or continuances, by way of imparlance, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings."⁽¹⁾ A plaintiff alone can discontinue; and it is his privilege to do so.⁽²⁾ An avowant cannot discontinue.⁽³⁾ The entire action, and not a part merely, must be discontinued; thus, after judgment on demurrer for the defendant as to one plea, the plaintiff cannot discontinue as to that plea only.⁽⁴⁾ A rule must be obtained for the purpose, which is a side-bar rule granted as a matter of course, before argument of a demurrer, or verdict, or writ of inquiry.⁽⁵⁾ In other cases application must be made to the court for a rule nisi. The court has not allowed the rule during a stay of proceedings;⁽⁶⁾ nor after a writ of inquiry has been executed

⁽¹⁾ Rule Pl. 31 T. T. 1853.

⁽²⁾ *Pott v. Hirst*, 1 D. & L. 910; 7 Sc. N. R. 800.

⁽³⁾ *Long v. Buckeridge*, 1 Str. 112.

⁽⁴⁾ *Benton v. Polkinghorne*, 16 M. & W. 8.

⁽⁵⁾ *Ibid.*

⁽⁶⁾ *Murray v. Silver*, 1 C. B. 638; 3 D. & L. 26.

and returned, unless with defendant's consent ; ⁽¹⁾ nor after a general verdict, unless a new trial has been ordered ; ⁽²⁾ yet it has been allowed after a special verdict, ⁽³⁾ unless the action was oppressive, ⁽⁴⁾ or unless the plaintiff's object was to adduce fresh proof to contradict the verdict. ⁽⁵⁾ Where the defendant had demurred, and succeeded on the demurrer, and the plaintiff had taken out a rule to discontinue, the court refused to set it aside, as the defendant was, nevertheless, entitled to his costs under the judgment. ⁽⁶⁾

"To entitle a plaintiff to discontinue *after plea* pleaded, it shall not be necessary to obtain the defendant's consent ; but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent that if they are not paid within four days after taxation, defendant shall be at liberty to sign judgment of *non pros*." ⁽⁷⁾

As to discontinuance after bringing error, see *ante*, p. 550.

Costs, and non-payment thereof.]—In general the plaintiff, on discontinuing, is bound by statute to pay costs, ⁽⁸⁾ and it is also made a condition on granting the rule, though by consent the rule may be otherwise drawn up. Where he discontinues without giving notice of trial, he is not liable to pay the costs of the draft and copies of briefs. ⁽⁹⁾ And where the jury being unable to agree are discharged by the judge from giving a verdict and the plaintiff discontinues, the defendant is not entitled to the costs of the trial. ⁽¹⁰⁾ The court, however, will not compel payment of costs, if the defendant has misconducted himself. ⁽¹¹⁾ Where the plaintiff succeeds at the trial, and after a new trial is ordered, discontinues, it seems he will not be held bound to pay the costs of the first trial, if the defendant, on succeeding at the second trial,

⁽¹⁾ *Stevens v. Etherick*, 1 Show. 63 ; *Carth.* 86.

⁽²⁾ *Price v. Parker*, 1 Salk. 178 ; *Young v. Hitchens*, 1 Dav. & M. 599 ; *Goodenough v. Butter*, 2 C. M. & R. 240 ; 3 Dowl. 751.

⁽³⁾ *Price v. Parker*, 1 Salk. 178.

⁽⁴⁾ *Boucher v. Lawson*, Hardr. 200.

⁽⁵⁾ *Roe v. Gray*, 2 W. Bl. 815.

⁽⁶⁾ *Sanson v. Rhodes*, 8 Sc. 557 ; see *Benton v. Pollinghorne*, 16 M. & W. 8 ; *Bentley v. Dawes*, 10 Exch. 347.

⁽⁷⁾ Rule Pr. 23, H. T. 1853.

⁽⁸⁾ 8 Eliz. c. 2, s. 2 ; 4 Jac. 1, c. 3 13 ; Car. 2, stat. 2, c. 2, s. 3.

⁽⁹⁾ *Postlethwaite v. Neale*, 2 M. & W. 732 ; 6 Dowl. 166 ; *Rivis v. Hatton*, 8 Dowl. 164.

⁽¹⁰⁾ *Wall v. London and South Western Railway Company*, 25 L. J. 93 Exch. ; *Brown v. Clarke*, 12 M. & W. 25.

⁽¹¹⁾ *Poensgen v. Chanter*, 6 Sc. 300 ; *Ames v. Ragg*, 2 Dowl. 35.

would not have got the costs of the first.⁽¹⁾ Yet where, after verdict for the defendant, a new trial was ordered, and the plaintiff, after giving fresh notice of trial, discontinued, the defendant was held entitled to the costs of searches of documents useful for the second trial.⁽²⁾ Where the plaintiff discontinued on finding the defendant was insolvent, he has not been made to pay costs.⁽³⁾ And he is expressly exempted when the defendant is made a bankrupt, and the plaintiff elects to prove his debt.⁽⁴⁾ He is not, however, exempted merely because the judge at the trial misdirected the jury.⁽⁵⁾ Where an uncertificated attorney conducted the defence, the plaintiff was made to pay only the sums actually advanced by the defendant to the attorney for costs.⁽⁶⁾ Where the plaintiff discontinues after succeeding on a demurrer to a plea, the costs of both may be taxed together, and the *allocatur* made out for the balance, unless the defendant bring error or dissent.⁽⁷⁾ Where an administratrix was made defendant in an action commenced against the intestate, by a suggestion under the Common Law Procedure Act, 1852, s. 138, and had pleaded to the suggestion, the court would not allow the plaintiff to discontinue without payment of *all the costs* of the cause.⁽⁸⁾

When the rule is granted on payment of costs, the condition is not fulfilled unless the taxed costs are actually paid; ⁽⁹⁾ thus, mere service of the rule is not enough; ⁽¹⁰⁾ nor a tender to the defendant of more than the costs amount to.⁽¹¹⁾ The plaintiff, however, seems not to be liable to an attachment for the non-payment of these costs, though the rule was granted on condition of payment; ⁽¹²⁾ and until he pays them he may himself proceed, ⁽¹³⁾ or be forced by the de-

(1) *Jolliffe v. Munday*, 4 M. & W. 502; *Earl of Macclesfield v. Bradley*, 7 M. & W. 570.

(2) *Daniel v. Wilkin*, 8 Exch. 156.

(3) *Ford v. Stock*, 1 Dowl. N. S. 763.

(4) 12 & 13 Vict. c. 106, s. 182; *Sainter v. Ferguson*, 8 C. B. 619.

(5) *Hernaman v. Barber*, 15 C. B. 774.

(6) *Paterson v. Powell*, 2 Dowl. 738; 3 M. & Sc. 195; *Paterson v. Johnson*, 2 Dowl. 739; 3 M. & Sc. 200.

(7) *Mayor of Macclesfield v. Gee*, 13 M. & W. 470; 2 D. & L. 418, the plaintiff being entitled to the costs of the demurrer, if he succeeds (*Bentley v. Dawes*, 10 Exch. 347); see also *Ellwood v. Bullock*, 6 Q. B. 383.

(8) *Benge v. Swayne*, 15 C. B. 785.

(9) *Edgington v. Proudman*, 1 Dowl. 152.

(10) *Whitmore v. Williams*, 6 T. R. 765.

(11) *Nolling v. Buckholtz*, 3 M. & Sel. 153.

(12) *Stokes v. Woodeson*, 7 T. R. 6.

(13) *Edgington v. Proudman*, 1 Dowl. 152.

fendant to proceed in the cause, for the rule to discontinue is not of itself a stay of proceedings.⁽¹⁾ But the defendant may in such a case sign judgment of *non pros.*⁽²⁾

Proceedings after discontinuance.—The defendant may apply to the court or a judge to set aside the side-bar rule for a discontinuance.⁽³⁾ He, however, cannot compel the plaintiff to enter the judgment of discontinuance on the roll until the costs are paid, if the discontinuance was allowed on payment of costs,⁽⁴⁾ for until the costs are paid the discontinuance is not complete.⁽⁵⁾ When the discontinuance is complete, the plaintiff may bring a fresh action; ⁽⁶⁾ and where he brings a new action without discontinuing the old, the court will stay proceedings.⁽⁷⁾

Form of Entry of Discontinuance on Roll.

Afterwards, to wit, on _____, come the parties aforesaid, by their respective attorneys aforesaid; and the plaintiff doth not further prosecute his said suit with effect, but voluntarily permits his said suit to be discontinued. Therefore, it is considered that the said A. B. take nothing by his said writ, and that the said C. D. recover against him £ _____ for his costs of defence.

2. *Cassetur Breve.*

When the defendant pleads in abatement, and the plaintiff can neither deny the plea nor demur, nor find it useful to amend, he may enter on the roll a judgment of *cassetur breve*, i. e., that the writ be quashed. For this purpose no leave of the court is necessary; and the practice is merely to deliver a copy of the entry of the judgment on paper to the defendant's attorney, in place of a pleading. The judgment must be entered on the roll after the declaration and plea, and then taken with a docket paper to one of the Masters, who will mark it, and it is then filed in the office. Neither party pays costs.⁽⁸⁾

⁽¹⁾ *Beeton v. Jupp*, 15 M. & W. 149.

⁽²⁾ Rule Pr. 23, H. T. 1853, *ante*, p. 851.

⁽³⁾ *Sansom v. Rhodes*, 8 Sc. 557; *Belchier v. Gansell*, 4 Burr. 2502; *Potts v. Hirst*, 6 M. & Gr. 934.

⁽⁴⁾ *Mayor of Macclesfield v. Gee*, 13 M. & W. 470.

⁽⁵⁾ *Molling v. Buckholtz*, 3 M. & Sel. 153; *Whitmore v. Williams*, 6 T. R. 765.

⁽⁶⁾ *Ibid.*

⁽⁷⁾ *Haigh v. Paris*, 16 M. & W. 144.

⁽⁸⁾ Pr. Reg. 6; *Greenhill v. Shepherd*, 12 Mod. 145; see *Pool v. Pembray*, 1 Dowl. 693.

Form of Entry on Roll of Cassetur Breve.

The day of A.D.

And hereupon the plaintiff, inasmuch as he cannot deny the matters by the defendant above pleaded, prays judgment, and that the said writ of the plaintiff may be quashed, to the intent that he may sue out a better writ against the defendant. Therefore, it is considered by the court here that the said writ be quashed.

Docket Paper.⁽¹⁾

The entry, [or further entry] of P. A., gentleman, &c., the day of , Victoria 18 ..
 (Venus) Entry of *cassetur breve* between } Roll
 A. B. plaintiff, and C. D. defendant, }
 on a plea in abatement.

3. *Nolle Prosequi.*

A *nolle prosequi* is an undertaking of the plaintiff entered on the record, either to abandon the whole or part of the suit as regards the defendant. It may be entered any time before judgment, without the plaintiff being barred from bringing a fresh action; but if entered after judgment, no fresh action can be brought.⁽²⁾ Where, however, there are several defendants, and a *nolle pros.* is entered before judgment as to one of them, this may prevent a fresh action against the rest, if the discharge of one was such as to discharge all the defendants.⁽³⁾ It cannot be entered after verdict or judgment against the plaintiff.

If the plaintiff enter a *nolle prosequi* as to a plea which goes to the whole cause of action, the defendant is entitled to enter up judgment on the whole record, though other pleas may also go to the whole cause of action.⁽⁴⁾ If one plea is pleaded to all the counts of the declaration, and it is a bar only to some counts, the plaintiff may enter a *nolle pros.* as to these counts,⁽⁵⁾ and he may recover on the other counts, though the matter proved might have been given in evidence under the counts abandoned.⁽⁶⁾ A *nolle prosequi* has also been allowed as to part of a count in trespass for taking

(1) In the C. P., the attorney makes an entry on the docket-roll in a book in the form there seen.

(2) *Bowden v. Horne*, 7 Bing. 716; *Amor v. Cuthbert*, 3 M. & Gr. 1; 3 Sc. N. R. 325; 1 Dowl. N. S. 160.

(3) *Cooper v. Tiffin*, 3 T. R. 511; 1 Wils. 90.

(4) *Peters v. Croft*, 6 Sc. 897; *Amor v. Cuthbert*, 3 Sc. N. R. 325.

(5) 1 Saund. 207, b.

(6) *Hayward v. Kain*, 1 M. & M. 311.

crops.⁽¹⁾ Where there are several defendants, and the action is *ex contractu*, a *nolle prosequi* cannot be entered as to one of the defendants;⁽²⁾ unless he severs in his plea, and pleads matter which goes to his personal discharge, as bankruptcy or insolvency;⁽³⁾ but not a plea of infancy, which is in effect a denial that there was any contract.⁽⁴⁾ Where an action *ex delicto* is brought against several defendants, a *nolle prosequi* may be entered, any time before final judgment, as to one or some of the defendants, whether they sever or not in pleading.⁽⁵⁾

Where the defendant demurs to the whole declaration, the plaintiff is not allowed, as a matter of course, to cure any error by entering a *nolle prosequi*;⁽⁶⁾ though, if the demurrer is to one or some counts only, he may.⁽⁷⁾

The *nolle prosequi* is in practice delivered like an ordinary pleading, and not entered on the record till the record requires for other purposes to be made up.⁽⁸⁾

Form of Nolle Prosequi.

And hereupon, on the plaintiff freely here in court says, that he will not further prosecute his suit against the defendant, [or add, if necessary, for or in respect of the causes of action in the said counts of the declaration mentioned, therefore, as to those causes of action, in those counts mentioned, let the defendant be acquitted, and go thereof without day.] *The judgment is the same as in nonuit, ante, p. 353.*

Costs.—The defendant is entitled to costs when a *nolle prosequi* is entered as to the whole declaration;⁽⁹⁾ and “where any *nolle prosequi* shall have been entered upon any

(1) *Wiggleson v. Dallison*, Doug. 190.

(2) *Noke v. Ingham*, 1 Wils. 90.

(3) *Ibid.*; *Moravia v. Hunter*, 2 M. & Sel. 444; *Hawkins v. Ramsbottom*, 6 Taunt. 179.

(4) *Boyle v. Webster*, 17 Q. B. 950.

(5) *Couz v. Lowther*, 1 Lord Raym. 597, 716; *Dale v. Eyre*, 1 Wils. 306; *Elliott v. Allen*, 1 C. B. 18.

(6) *Butler v. Mapp*, 10 Bing. 391; 4 M. & Sc. 258; *Drummond v. Durant*, 4 T. R. 360; see *Strother v. Randerson*, 5 Dowl. 280.

(7) *Bertram v. Gordon*, 6 Taunt. 445; *Quarrington v. Arthur*, 11 M. & W. 491; 2 Dowl. N. S. 1036. See *post*, “Demurrer.”

(8) *Luckin v. Gompertz*, Car. & M. 55; see *Fleming v. Langton*, 1 Str. 532; *Duperoy v. Johnson*, 7 T. R. 473.

(9) *Cooper v. Tiffin*, 3 T. R. 511.

count, or as to part of any declaration,⁽¹⁾ the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf."⁽²⁾ Where defendant pleaded three pleas, one of which was a set-off, and another payment into court, and plaintiff admitted the set-off, and took the money out of court, and entered a *nolle prosequi* as to all except that sum, the defendant was held entitled to the costs of the other issues.⁽³⁾ So, "where several persons shall be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, every such person shall have judgment for and recover his reasonable costs."⁽⁴⁾ When the costs are taxed, the costs of the *nolle prosequi* are set off against any costs due to the plaintiff, and execution issues for the balance.

4. *Retraxit*.

Instead of entering a *nolle prosequi* on the record, the plaintiff may, in person, appear in court at the trial, and make a *retraxit* of his declaration, which has the effect of barring any future action.⁽⁵⁾ A *retraxit* is a voluntary renunciation of his suit.⁽⁶⁾

5. *Remittitur Damna*.

Where there are several counts in a declaration, and the plaintiff has obtained interlocutory judgment on all, but he has sustained no real damages upon some of them, he may enter a *remittitur damna* as to these, in order to obtain a reference to the Master on the others.⁽⁷⁾ So, if the jury give more damages than the plaintiff declared for;⁽⁸⁾ or if

(1) Or part of the cause of action, *Williams v. Sharwood*, 3 Buz. N. C. 331; 3 Sc. 761.

(2) 3 & 4 Will. 4, c. 42, s. 33.

(3) *Goode v. Goldsmith*, 2 M. & W. 202; 5 Dowl. 288; *Amor v. Cuthbert*, 3 M. & Gr. 1; 2 Dowl. N. S. 160.

(4) 3 & 4 Will. 4, c. 42, s. 32.

(5) 1 Saund. 207 n; Sellon's Pract. "*Retraxit*," 338.

(6) 3 Bl. Com. 296. See *Herbert v. Sayer*, 2 D. & L. 49, where, after judgment for the plaintiff in the Court of Error, the Court of Queen's Bench allowed the plaintiff to enter a *retraxit* for the defendant of a plea which involved an issue of fact, and which had been left on the record, and carried up in the transcript for the sole purpose of explaining the record, which would have otherwise been unintelligible.

(7) *Fleming v. Langton*, 1 Str. 532; *Jones v. Shiel*, 3 M. & W. 433; 6 Dowl. 579.

(8) *Wray v. Lister*, Str. 1110; *Coy v. Hymas*, id. 1171.

there is a writ of trial, and more than 20*l.* damages is given;⁽¹⁾ or if the jury give damages in a penal action;⁽²⁾ or if, in a vovry, more rent is demanded than is due;⁽³⁾ or if, in debt, consisting of several items, more is demanded than is due,⁽⁴⁾ the mistake may be corrected by entering a *remittitur* for the excess,⁽⁵⁾ but the court could not, it seems, allow this to be done after signing final judgment.⁽⁶⁾ Where a declaration showed on the face of it that too much was claimed, the plaintiff might also enter a *remittitur*, if the defendant had not demurred on that ground, and if the sum was not entire.⁽⁷⁾

6. *Compounding Penal Actions.*

Where a common informer sues in the superior courts for a statutory penalty, he cannot compound such action with the defendant without first obtaining the leave of the court, otherwise he is liable to a penalty.⁽⁸⁾ It is in the discretion of the court to grant leave.⁽⁹⁾ It is not, however, necessary if the plaintiff is the party grieved.⁽¹⁰⁾ "Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice shall have been given to the proper officer; but in other cases it may."⁽¹¹⁾ The proper officer, on the part of the Crown, is the solicitor of the Treasury, and, on the consent of the Attorney-General, the court generally gives leave as a matter of course.⁽¹²⁾ The court has refused leave where the penalty was for keeping a disorderly house,⁽¹³⁾ for selling gold rings of inferior quality,⁽¹⁴⁾ where part of the penalty went to the poor.⁽¹⁵⁾

(1) *Pryer v. Smith*, 12 L. J. 223, C. P.

(2) *Hardy v. Cathcart*, 1 Marsh. 180.

(3) *Inclendon v. Cripps*, 2 Salk. 659; 7 Mod. 87.

(4) *Id.*, 2 Lord Raym. 815; *Pemberton v. Shelton*, Cro. Jac. 499.

(5) *Simmons v. Wood*, 5 Q. B. 170.

(6) *Phillips v. Jones*, 15 Q. B. 859. But see *Usher v. Dansey*, 4 M. & Sel. 94, where this was allowed after final judgment, and after error brought on that ground.

(7) 1 Saund. 285; *Coy v. Hymas*, 2 Str. 1171.

(8) 18 Eliz. c. 5; *R. v. Crisp*, 1 B. & Ald. 282.

(9) *Maughan v. Walker*, 5 T. R. 98; *Howell v. Morris*, 1 Wils. 79, 130.

(10) *Kirkham v. Wheely*, 1 Salk. 30.

(11) Rule Pr. 118, H. T. 1853.

(12) *Sheldon v. Mumford*, 5 Taunt. 268; *R. v. Gibbs*, 3 Dowl. 345.

(13) *Bellis v. Beale*, 1 Chitt. R. 381 n.; *Wood v. Johnson*, 2 W. Bl. 1157.

(14) *Howell v. Morris*, 1 Wils. 79.

(15) *Hunson v. Spenge*, 2 Smith, 195.

The application cannot be made before the defendant has pleaded,⁽¹⁾ and is seldom entertained after verdict, unless under special circumstances.⁽²⁾ Nor can the application be made at *Nisi Prius*.⁽³⁾ The application must be founded on an affidavit, stating the amount of the penalty, the statute prescribing it, the state of the cause, and the agreement of the parties as to the terms of composition. When the Crown is concerned, the plaintiff's attorney, after giving notice of motion to the solicitor of the Treasury, delivers to him a copy of the affidavit, with the declaration and plea, and afterwards, these are returned, with a consent brief on the part of the Attorney-General, on payment of the fees. A consent brief must then be signed by the plaintiff's counsel, and also one by defendant's counsel. The three briefs and affidavit are then taken to the Master's office, and the rule is drawn up, and this being served on the defendant's attorney, the latter attends and pays the money to the officer of the court, who afterwards pays one moiety to the plaintiff on the latter being identified by his attorney.

"The rule for compounding any *qui tam* action shall express therein, that the defendant thereby undertakes to pay the sum, for which the court has given him leave to compound such action."⁽⁴⁾ "When leave is given by the Court of Queen's Bench to compound a penal action, the Queen's half of the composition shall be paid into the hands of the Master of the Crown office for the use of Her Majesty;"⁽⁵⁾ but in the other courts it is paid to one of the Masters.⁽⁶⁾

Costs.]—The sum for which the action is compounded must be paid by the defendant, otherwise an attachment lies against him.⁽⁷⁾ The statute, in general, regulates the right of the plaintiff to costs; and when it gives costs, he has been allowed a sum which, together with costs, exceeded the sum paid to the Crown,⁽⁸⁾ though not if collusion was shown.⁽⁹⁾

(1) *R. v. Collier*, 2 Dowl. 581.

(2) *Crowder v. Wagstaff*, 1 B. & P. 18; *Morgan v. Lute*, 1 Chitt. R. 381.

(3) *Ibid.*

(4) Rule Pr. 119, H. T. 1853

(5) *Ibid.* r. 120.

(6) See *Wood v. Ellis*, 2 W. Bl. 1154.

(7) *R. v. Clifton*, 5 T. R. 257.

(8) *North v. Smart*, 1 B. & P. 51; *Wood v. Johnson*, 2 W. Bl. 1157.

(9) *Wood v. Cassin*, 2 W. Bl. 1157.

Where the statute gave no costs, and the plaintiff consented to stay proceedings, on payment of a sum in equal moieties to the Crown and himself, and the entire costs to himself, it was held the Crown was entitled to half the costs also.⁽¹⁾

7. Judgment of Non Pros.

When the plaintiff neglects, at any stage of the cause, to proceed according to the rules of the court, the defendant may obtain judgment of *non prosequitur* against him for his costs. For this purpose an *incipitur* of the declaration is made out and taken to the Master's office, when judgment will be signed and the costs taxed and marked on the judgment paper. This judgment does not prevent the plaintiff commencing a new action for the same cause.⁽²⁾

For not declaring, replying, &c.—The plaintiff is bound to declare within one year after the writ of summons is returnable, otherwise he is out of court;⁽³⁾ though, if he does not declare in the term next after the appearance has been entered, the defendant may, by a four days' notice, compel him to do so (unless he obtain time or is stayed), and, in default, may sign judgment of *non pros.*⁽⁴⁾ The plaintiff cannot, however, be *nonprossed* for not delivering particulars, pursuant to a judge's order.⁽⁵⁾ When the plaintiff has been ordered to find security for costs, he is not bound to declare within the year, for it may be no default of his that he cannot find security; but if he were to give the security within the year, after service of the summons, then he must also declare within the year.⁽⁶⁾ Where there are several defendants, one of them, if all have appeared and if the plaintiff is in default as to all, may sign judgment of *non pros.* against the plaintiff on behalf of all, but not otherwise.⁽⁷⁾

(1) *Lee v. Cass*, 2 Taunt. 213.

(2) *Turton v. Hayes*, 1 Str. 439.

(3) C. L. P. Act, 1852, s. 58, *ante*, p. 122.

(4) *Foster v. Pryme*, 8 M. & W. 664; *Gray v. Pennell*, 1 Dowl. 120; C. L. P. Act, 1852, s. 53.

(5) *Burgess v. Swayne*, 7 B. & C. 485; *Somers v. King*, 7 D. & R. 125; *Sutton v. Clarke*, 8 Bing. 165; 1 M. & Sc. 271.

(6) *Ross v. Green*, 10 Exch. 891. The case would be different where the plaintiff had been ordered to give particulars: *ibid.*; *Johns v. Saunders*, 5 D. & L. 49.

(7) *Hamlet v. Breedon*, 4 M. & Gr. 909; 5 Sc. N. R. 893; *Morton v. Grey*, 9 B. & C. 544.

So, judgment of *non pros.* may be signed against the plaintiff for not *replying* in due time, unless perhaps, the plea be a nullity.⁽¹⁾

So, if the plaintiff omit to take issue on any one of several pleas, and he be served with notice to reply, and make default, the defendant may sign *non pros.* as to that plea, though not as to the whole action.⁽²⁾

If the *plaintiff in error* do not enter a suggestion of error in due time, the defendant in error may sign judgment of *non pros.*⁽³⁾

If the plaintiff has obtained a rule to discontinue, on payment of costs, and does not pay them within the time fixed, the defendant may also sign judgment of *non pros.*⁽⁴⁾ But where a second action, brought by the plaintiff, is stayed until the costs of the former action are paid, he cannot be *nonprossed* for non-payment of those costs.⁽⁵⁾

Setting aside judgment of non pros.—The court exercises a discretion as to setting aside a *non pros.* regularly signed, and, in general, will only do so on an affidavit of merits both at the time of action brought and of the application, and also on payment of costs,⁽⁶⁾ i. e. the costs of the judgment and of opposing the rule to set aside.⁽⁷⁾ Where the plaintiff sues as a common informer, the court will not set the *non pros.* aside.⁽⁸⁾ Where, however, the *non pros.* was irregularly signed, the judgment, and any proceedings founded thereon, may be set aside, with costs, on prompt application,⁽⁹⁾ as where the debt and costs were paid before it was signed.⁽¹⁰⁾

Costs.—The defendant is always entitled to his costs on

(1) *Garratt v. Cooper*, 1 Dowl. 28. See *Gould v. Whitehead*, 8 Sc. 340.

(2) See *Topham v. Kidmore*, 5 Dowl. 676; *Emmot v. Standen*, 3 M. & W. 497; 6 Dowl. 591; *Dordsey v. Cook*, 4 B. & C. 135.

(3) See *ante*, p. 531.

(4) Rule Pr. 23, H. T. 1853, *ante*, p. 851.

(5) *Doe d. Sutton v. Ridgway*, 5 B. & Ald. 523.

(6) *Cartessos v. Hume*, 2 Dowl. 134.

(7) *Christie v. Thompson*, 1 Dowl. N. S. 592.

(8) *Bennet v. Smith*, 1 Burr. 40; 2 Lord Ken. 82.

(9) *Barlow v. Kaye*, 4 T. R. 638; *Walker v. Medland*, 1 D. & L. 159. See *Belcher v. Goodered*, 4 C. B. 472, where the attorney was ordered to pay the costs.

(10) *Kibblethwaite v. Jeffrys*, 1 Chitt. R. 142.

signing a judgment of *non pros.*, the judgment being in effect a nonsuit within 4 Jac. 1, c. 3, 23 Hen. 8, c. 15.⁽¹⁾ Execution may issue on the judgment by *ca. sa.* or *fi. fa.*;⁽²⁾ or an action may be brought on the judgment, and the plaintiff in such action would be entitled to costs.⁽³⁾

Form of Non Pros. for not Declaring.

In the Q. B. ["C. P." or "Exch. of Pleas."]

The day of , A.D. , (*day of signing judgment*)
 England } A. B., in his own person, [*or by P. A., his attorney.*]
 to wit. } on the day of , A.D. , sued out a writ of
 summons against C. D. And the said C. D., on , by P. A.,
 his attorney, caused an appearance to be entered for him to the
 said writ. And afterwards, on , the said C. D. gave notice
 in writing to the said A. B., requiring him to declare in this action
 within four days from the time of giving such notice, otherwise
 judgment; and although the said four days have elapsed, the said A. B.
 hath not declared herein. Therefore it is considered that the said A. B.
 take nothing by his said writ, and that the defendant go thereof without
 day, &c., and that the said C. D. do recover against the said A. B.
 £ , for his costs of defence.

[*In the margin of the roll write as usual, "judgment signed the*
day of , 18 ."]

⁽¹⁾ *Davies v. James*, 1 T. R. 373; *Hawes v. Saunders*, 3 Burr. 1585; 3 & 4 Will. 4, c. 42, s. 31.

⁽²⁾ *Murray v. Wilson*, 1 Wils. 316.

⁽³⁾ *Bennett v. Neale*, 14 East, 343.

CHAPTER XX.

SECURITY FOR COSTS.

In what cases.—The court exercises a general jurisdiction in compelling a plaintiff who resides abroad, or who, in the event of his failure in the action, would not be compellable by process of the court to pay costs, to find security for costs. This is necessary where the plaintiff permanently resides in Ireland,⁽¹⁾ or Scotland,⁽²⁾ or elsewhere out of the jurisdiction.⁽³⁾ It is immaterial that he sues only in a representative capacity,⁽⁴⁾ or is a mere nominal plaintiff,⁽⁵⁾ or a plaintiff in error,⁽⁶⁾ and that there is no defence on the merits.⁽⁷⁾ But the court will not order security if the plaintiff is an Englishman, and abroad in the military, or naval, or public service of his country,⁽⁸⁾ as, for example, a commissioner of the Ionian Islands;⁽⁹⁾ or harbour master in Barbadoes;⁽¹⁰⁾ or as an English officer serving in South America;⁽¹¹⁾ or in the East India Company's military service,⁽¹²⁾ but not if in the Company's civil service.⁽¹³⁾

Nor will security be required, if the residence out of the

(1) *Fitzgerald v. Whitmore*, 1 T. R. 362.

(2) *Baxter v. Morgan*, 6 Taunt. 379.

(3) *Pray v. Eadie*, 1 T. R. 267; *Lloyd v. Davies*, 1 Price, N. R. 11; 1 Tyr. 533.

(4) *Chevalier v. Finnis*, 1 B. & B. 277; 3 Moore, 602.

(5) *Youde v. Youde*, 3 A. & E. 311.

(6) *Lewis v. Owens*, 5 B. & Ald. 265.

(7) *Edinburgh and Leith Railway Company v. Dawson*, 7 Dowl. 573.

(8) *Willis v. Garbutt*, 1 Y. & J. 511; *Dowling v. Harman*, 6 M. & W. 131; 8 Dowl. 165; *Durell v. Matheson*, 8 Taunt. 711.

(9) *Lord Nugent v. Harcourt*, 2 Dowl. 578.

(10) *Evering v. Chiffenden*, 7 Dowl. 536.

(11) *O'Lawler v. Macdonald*, 8 Taunt. 736; 3 Moore, 77.

(12) *Garwood v. Bradburn*, 9 Dowl. 1031.

(13) *Plowden v. Campbell*, 23 L. J. 384, Q. B.

jurisdiction is merely *temporary*, as in the case of a seaman serving in a ship trading with this country,⁽¹⁾ unless the absence is likely to be great, as for eighteen months, in which case either he will be made to give security, or there will be a stay of proceedings till his return.⁽²⁾ If the plaintiff *leaves the country after* commencing the action he may not be called upon to find security, though it seems he will, if he is absent at the time of action brought, but intending to return shortly.⁽³⁾ And if he leave shortly after action commenced, intending to reside permanently abroad, he must give security.⁽⁴⁾ Where he is generally resident abroad, but comes to this country for a temporary purpose, and is here at the commencement of the action, he will not be made to give security,⁽⁵⁾ though he may intend to go abroad immediately.⁽⁶⁾

Nor will security be required, if any *one of several* co-plaintiffs reside in this country,⁽⁷⁾ though such one be a bankrupt.⁽⁸⁾ If the plaintiffs are a railway company, whose works are abroad, security will be required, though some of the shareholders reside here.⁽⁹⁾ If the plaintiffs are husband and wife, and the former reside abroad, though the wife reside here, he will require to give security.⁽¹⁰⁾

Nor will security be required if the plaintiff is a peer *privileged* from arrest,⁽¹¹⁾ or a foreign ambassador, or a servant of an ambassador.⁽¹²⁾ Yet a foreign sovereign has been made to give security.⁽¹³⁾

The plaintiff will not be exempted from giving security though he has personal property in this country, nor even

(1) *Durell v. Matheson*, 8 Taunt. 711; *Henshen v. Garves*, 2 H. Bl. 383; *Nelson v. Ogle*, 2 Taunt. 253; *Taylor v. Fraser*, 2 Dowl. 622; *Frodsham v. Myers*, 4 Dowl. 280.

(2) *Foss v. Wagner*, 2 Dowl. 499.

(3) *Wells v. Barton*, 2 Dowl. 160.

(4) *Kemble v. Mills*, 8 Dowl. 836; 1 Scott, N. R. 402.

(5) *Dowling v. Harman*, 6 M. & W. 131; *Tambisco v. Pacifico*, 7 Exch. 816.

(6) *Viragno v. Hassan*, 6 Taunt. 20.

(7) *Anon.* 2 C. & J. 88; 1 Dowl. 300; *Thornel v. Roelandts*, 2 C. B. 290; *Orr v. Bowles*, 1 Hodg. 23, 315.

(8) *McConnell v. Johnstone*, 1 East, 431.

(9) *Kilkenny Railway Company v. Fielden*, 2 L. M. & P. 124; 6 Exch. 81; *Limerick and Waterford Railway Company v. Fraser*, 4 Bing. 394.

(10) *Hanmer v. Mangles*, 12 M. & W. 313; 1 D. & L. 395.

(11) *Earl Ferrars v. Robins*, 2 Dowl. 636; *ib.* 578.

(12) *Duke de Montellano v. Christin*, 5 M. & Sel. 509.

(13) *King of Greece v. Wright*, 6 Dowl. 12; *Emperor of Brazil v. Robinson*, 5 Dowl. 522.

if he has real property, unless he show that it is available for execution.⁽¹⁾ If the plaintiff cannot give security, owing to the defendant's having taken possession of the plaintiff's property, security will not be required.⁽²⁾

Mere insolvency is no ground for calling for security.⁽³⁾ A bankrupt or insolvent suing on his own account, as for a cause of action which does not pass to his assignees, is not held bound to give security for costs;⁽⁴⁾ nor in like manner if he becomes bankrupt or insolvent after action brought.⁽⁵⁾ When he becomes bankrupt or insolvent during action, and the action is for the benefit of the assignees, the defendant should apply to the assignees to know whether they will continue the action and give security for costs, and if they decline or refuse for eight days, the defendant may plead the bankruptcy or insolvency in bar.⁽⁶⁾

Where the plaintiff is *poor*, the defendant cannot compel him to find security for costs merely on that ground. If he sues in *formâ pauperis*, and has been dispaupered, the plaintiff may be compelled;⁽⁷⁾ and if he sues nominally only, and for the benefit of a third party, and is in insolvent circumstances, the court will compel such third party to give security,⁽⁸⁾ as where the action is carried on for the benefit of the attorney,⁽⁹⁾ for the benefit of the landlord,⁽¹⁰⁾ to try the right of a third party.⁽¹¹⁾ But the court has refused where the plaintiff had entirely denuded himself of any interest⁽¹²⁾ or sued as assignor of a chose in action.⁽¹³⁾ Where the nominal plaintiff is resident abroad, he will be compelled to find security, though his

(1) *Swinbourne v. Carter*, 1 Bail. C. C. 209; *Edinburgh and Leith Railway Company v. Dawson*, 7 Dowl. 577.

(2) *McCulloch v. Robinson*, 2 N. R. 352.

(3) *Thornel v. Roelandts*, 2 C. B. 290.

(4) *Ibid.*; *Andrews v. Morris*, 7 Dowl. 712; *Wray v. Brown*, 6 Bing. N. C. 271; 8 Sc. 557.

(5) *Stead v. Williams*, 5 C. B. 528; *Beckham v. Knight*, 6 Dowl. 227; *Taylor v. Montague*, 2 M. & W. 315.

(6) C. L. P. Act, 1852, s. 142, *ante*, p. 686.

(7) *Mylett v. Hacker*, 5 Dowl. 647.

(8) *Perkins v. Adcock*, 14 M. & W. 808; 3 D. & L. 270; *Andrews v. Morris*, 7 Dowl. 714; *Goatley v. Emmart*, 15 C. B. 291.

(9) *Gell v. Curzon*, 4 Exch. 813; *Haggarth v. Wilkinson*, 12 Q. B. 857. See *Morris v. James*, 6 Dowl. 514, where the defendant's attorney was sought to be made liable to give security for costs, on the ground of delaying appearance.

(10) *Ball v. Ross*, 1 M. & Gr. 444; 1 Sc. N. R. 217.

(11) *Hearsay v. Pechell*, 7 Dowl. 437; 7 Sc. 477.

(12) *Parker v. Great Western Railway Company*, 19 L. J. 335, C. P.

(13) *Wray v. Brown*, 8 Sc. 557; *Perkins v. Adcock*, 14 M. & W. 809.

a-signee has given a written undertaking to pay all costs.⁽¹⁾ Sometimes, where a third party is an instigator of the action, the plaintiff will be required to give security;⁽²⁾ but not after judgment.⁽³⁾ Sometimes, also, the nominal plaintiff may call on the parties who are the real litigants for security for costs, or for an indemnity for the use of his name, as where the names of trustees or assignees are used without their consent.⁽⁴⁾ So, where a wife, living apart from her husband, employed an attorney to bring an action in their joint names, the court stayed proceedings till security for costs should be given to the husband.⁽⁵⁾ In such cases the court does not order the third party directly to find security, such party being a stranger to the record, but an order is made to stay proceedings until security is given.⁽⁶⁾ Moreover, the plaintiff's voluntary proceedings only are stayed, for the defendant may still force on the action.⁽⁷⁾

Executors are liable to find security like other plaintiffs.⁽⁸⁾

Lunacy alone is not a ground for ordering security.⁽⁹⁾

A convict under sentence of transportation may be ordered to give security;⁽¹⁰⁾ and a plaintiff absconding to avoid a criminal charge has also been so ordered.⁽¹¹⁾ So where, after issue joined, he was sentenced to transportation.⁽¹²⁾ But a prisoner of war detained here, and suing for wages earned in an English ship, has not been made to find security.⁽¹³⁾

A defendant cannot be made to give security for costs.⁽¹⁴⁾ But where the defendant is an actor or quasi plaintiff in the suit, he may; as in *replevin*,⁽¹⁵⁾ in an interpleader issue;⁽¹⁶⁾

(1) *Hanmer v. Mangles*, 12 M. & W. 313; 1 D. & L. 394.

(2) *Tenant v. Brown*, 5 B. & C. 203. See *Hearsay v. Pechell*, 5 Bing. N. C. 466; 7 Dowl. 437.

(3) *Hayward v. Giffard*, 4 M. & W. 194.

(4) *Spicer v. Todd*, 2 C. & J. 165; 1 Dowl. 306; *Whitehead v. Hughes*, 2 Cr. & M. 318; 2 Dowl. 258.

(5) *Procter v. Brotherton*, 9 Exch. 486.

(6) *Elliott v. Kendrick*, 9 Dowl. 196; 4 P. & D. 306; *Hayward v. Giffard*, 4 M. & W. 194. But see *Evans v. Roes*, 2 Q. B. 334; *post*, "Ejectment."

(7) *Laws v. Bott*, 4 D. & L. 559.

(8) 3 & 4 Will. 4, c. 42, s. 31; *Chevalier v. Finnis*, 1 B. & B. 277; 3 Moore, 602. (9) *Barrett v. Power*, 9 Exch. 338.

(10) *Steel v. Allan*, 2 B. & P. 437. See as to an infant, *ante*, p. 638.

(11) *Rogers v. Banger*, 4 Dowl. 411.

(12) *Harvey v. Jacob*, 1 B. & Ald. 159.

(13) *Marice v. Hall*, 2 B. & P. 236.

(14) *Baxter v. Morgan*, 6 Taunt. 379.

(15) *Selby v. Crutchley*, 1 B. & B. 505; 4 Moore, 280.

(16) *Benazeek v. Bessett*, 1 C. B. 313; *Williams v. Crossling*, 3 C. B. 957; *Webster v. Delafield*, 7 C. B. 187; 4 D. & L. 660.

so in error.⁽¹⁾ But a defendant who gives notice of trial by proviso is not bound to give security.⁽²⁾

Application, and when made.—The application cannot be made until the defendant or one of the defendants has appeared.⁽³⁾ Moreover, “an application to compel the plaintiff to give security for costs must, in ordinary cases, be made before issue joined;”⁽⁴⁾ and the defendant is not prevented by obtaining time to plead,⁽⁵⁾ or by having undertaken to accept short notice of trial,⁽⁶⁾ or by having referred the cause to arbitration.⁽⁷⁾ The application will be allowed after issue joined, only if the defendant apply promptly after becoming aware of the ground of the application; ⁽⁸⁾ but sometimes the court will refuse, if all the costs have been already incurred.⁽⁹⁾

Before the application to the court, a demand must have been made for security from the plaintiff or his attorney, if a stay of proceedings is required;⁽¹⁰⁾ and a notice of motion is not equivalent to such demand.⁽¹¹⁾ It is not necessary, however, to wait for a distinct refusal, though the court may, in the absence of what is equivalent to a refusal, refuse to grant the rule with a stay of proceedings.⁽¹²⁾

Form of Demand of Security.

I hereby require of the plaintiff to give the defendant in this action security for the payment of the defendant's costs, otherwise I shall apply to the court for a rule to compel him to do so. Dated, &c.

(1) *Haygarth v. Wilkinson*, 12 Q. B. 851.

(2) *Ford v. Stock*, 1 Dowl. N. S. 763. As to the defendant in ejectment, see *Butler v. Meredith*, 24 L. J. 239, Exch.

(3) *De la Preuoe v. Biron*, 4 T. R. 697; *Carr v. Shaw*, 4 T. R. 496.

(4) Rule Pr. 22, H. T. 1853.

(5) *Gurney v. Key*, 3 Dowl. 559; *Fletcher v. Lew*, 3 A. & E. 551; but where the defendant pleaded, after it came to his knowledge, that the plaintiff was abroad, security for costs was refused, *Brown v. Wright*, 1 Dowl. 95; *Doe d. Somers v. Brood*, 1 Dowl. N. S. 857.

(6) *Edinburgh &c. Railway Company v. Dawson*, 7 Dowl. 573; *West v. Cook*, 1 C. B. 312; 2 D. & L. 884.

(7) *Gell v. Curzon*, 4 Exch. 813.

(8) *Wainwright v. Bland*, 2 C. M. & R. 740; *Young v. Rishworth*, 8 A. & E. 479 n.; *Doe v. Brood*, 1 Dowl. N. S. 857.

(9) *Kemble v. Mills*, 1 Sc. N. R. 402; 1 M. & Gr. 565.

(10) *King of Greece v. Wright*, 6 Dowl. 12; *Fountain v. Steele*, 5 Dowl. 331; *Fletcher v. Lew*, 3 A. & E. 552. See also Rule Pr. 160, H. T. 1853.

(11) *Huntley v. Bulwer*, 6 Dowl. 633; 6 Sc. 247.

(12) *Ibid.*; *Adams v. Brown*, 1 Dowl. 273; 2 M. & Sc. 154.

How.—The application is generally made to a judge at chambers; or it may be made to the court. If a stay of proceedings is desired, a two days' notice of motion must be given.⁽¹⁾ There must be an affidavit, which should state the position of the cause,⁽²⁾ and the particular grounds for the deponent's belief as to the situation of the plaintiff, so as to make out a *primâ facie* case; and mere information and belief is not sufficient.⁽³⁾ It is not a sufficient ground that the plaintiff is a foreigner lately come to this country, having no family connexions or permanent abode in it, and likely soon to leave it, if it be not sworn that he has a permanent residence abroad.⁽⁴⁾ The defendant need not show any defence on the merits.⁽⁵⁾ Where the application has been refused, the motion cannot be renewed on amended affidavits.⁽⁶⁾

Form of Affidavit.

In the [Q. B. or "C. P." or "Exch. of P."]

Between A. B., plaintiff,
and

C. D., defendant.

I, C. D. of , the above-named defendant, and I, D. A. of , gentleman, his attorney, make oath and say—

1. I, C. D., say that the said plaintiff's residence is at , in the dominion [or kingdom] of , and that the said plaintiff now resides there.

2. And I, D. A., for myself, say that an appearance was duly entered for the said defendant in this action, and issue has not been joined herein; and I did, on the day of last, for and on the part of the said defendant, demand of P. A., gentleman, the attorney of the above-named plaintiff in this action, security for the costs of this action, but the said P. A. refused to give any such security, and I did, thereupon, on the said day of last, serve the said P. A. with a true copy of the notice hereunto annexed, by delivering such copy to the said P. A., at his chambers, in , &c.

Granting the application.—If the judge or court grant the application, the rule or order in general merely stays proceedings until security be given.⁽⁷⁾ The court will, it

⁽¹⁾ Rule Pr. 160, H. T. 1853.

⁽²⁾ This is not absolutely necessary, *Jones v. Jones*, 2 Tyr. 216; *Cole v. Perry*, 1 T. & Gr. 1006.

⁽³⁾ *Cardwell v. Baynes*, 23 L. T. 179; *Joynes v. Collinson*, 2 D. & L. 449; 13 M. & W. 558; *Hanmer v. Mangles*, 12 M. & W. 313.

⁽⁴⁾ *Drummond v. Tillinghist*, 16 Q. B. 740.

⁽⁵⁾ *Edinburgh &c. Railway Company v. Dawson*, 7 Dowl. 576.

⁽⁶⁾ *Joynes v. Collinson*, *supra*.

⁽⁷⁾ *Lewis v. Owens*, 1 B. & Ald. 265; *Hill v. Fletcher*, 5 Exch. 470; *Todd v. Johnson*, 2 Bail C. Rep. 203.

seems, order the security to be given generally for costs, without excluding the costs already incurred.⁽¹⁾ The court will not fix a time peremptorily for finding security;⁽²⁾ nor can defendant sign *non pros.* if the plaintiff fail within a given time to do so.⁽³⁾ If the defendant wishes to force on the proceedings, he can only abandon the rule or order, and proceed as in ordinary cases.⁽⁴⁾ If the parties cannot agree on the amount and nature of the security, the Master will by appointment settle it, and his decision is generally held by the court conclusive.⁽⁵⁾ The security generally required is a bond, and not a mere written undertaking;⁽⁶⁾ but where the plaintiff has already an unsatisfied judgment standing against the defendant, he has been allowed to give an undertaking, in the event of the defendant obtaining a verdict, to set-off the costs against such judgment.⁽⁷⁾ If the surety become bankrupt, fresh security cannot be insisted on.⁽⁸⁾ If the plaintiff, after being ordered to find security, but before giving security, return to this country, and have no intention of going abroad again, he may apply to rescind the judge's order;⁽⁹⁾ but after actually giving security, the court will not allow it to be given up or cancelled on the ground of the plaintiff's return to England, though he allege he intends to reside here permanently.⁽¹⁰⁾ Where the plaintiff had given security in the court below and brought error, the costs below exceeding the amount for which security had been given, the Court of Exchequer Chamber ordered security for costs in error to be given.⁽¹¹⁾

Where an order was made that the plaintiff do forthwith give security for costs, but no stay of proceedings in the meantime, the plaintiff's attorney undertaking to find such security, it was held this meant the attorney was only to

(1) *Harvey v. Jacob*, 1 B. & Ald. 159; but see *Oxenden v. Cooper*, 4 Dowl. 574.

(2) *Broughton v. Jeremy*, 1 Har. & W. 525.

(3) *Kelly v. Brown*, 5 Dowl. 264; but defendant may, after a reasonable time, be allowed to take money out of court, paid in in lieu of bail, *Tassie v. Kennedy*, 5 D. & L. 587.

(4) *Tassie v. Kennedy*, 5 D. & L. 589.

(5) *Mais v. Macnamara*, 5 Exch. 267; 1 L. M. & P. 296; *French v. Maule*, 5 Sc. N. R. 719; 4 M. & Gr. 107; *Kent v. Poole*, 7 Dowl. 572.

(6) *Youde v. Youde*, 3 A. & E. 311.

(7) *Bristowe v. Needham*, 4 M. & Gr. 906; 2 Dowl. N. S. 658.

(8) *Jones v. Jacobs*, 2 Dowl. 61.

(9) *Place v. Campbell*, 6 D. & L. 113; the plaintiff must make an affidavit himself, *Thrasher v. Busk*, 2 Dowl. N. S. 51.

(10) *Badnall v. Hayley*, 4 M. & W. 535; 7 Dowl. 19.

(11) *Bougleaux v. Swayne*, 3 E. & B. 829.

give security if further proceedings were taken, and hence he was not liable to an attachment for not giving security, having taken no proceeding.⁽¹⁾

It seems, where an order has been made for a stay of proceedings until security be given for costs, no calendar month's notice of intention to proceed is necessary when security has been given.⁽²⁾

Form of Condition in the Bond given as security.

Whereas an action hath been commenced, and is now depending in Her Majesty's Court of _____, at Westminster, wherein the said A. B. is the plaintiff, and the abovenamed C. D. is the defendant, and all proceedings in the said action are stayed until security be given for the defendant's costs therein. Now, therefore, the condition of the above-written bond or obligation is such that, if the above bounden A. B. and E. F., or either of them, they or either of their heirs, executors, or administrators do pay or cause to be paid unto the said C. D., his executors, administrators, or assigns, such costs as the said A. B., or any other person or persons made or substituted as plaintiff or plaintiffs in the said action, shall in due course of law be liable to pay, in case he or they shall discontinue, become nonsuit, or a verdict shall pass against him or them in the same, such costs to be first taxed by one of the Masters in the usual manner, or in case of a judgment obtained by the said C. D., or any other person or persons, made or substituted defendant or defendants in the said action, for his or their costs, then the above obligation to be void, otherwise to be and remain in full force and effect.

⁽¹⁾ *Hill v. Fletcher*, 5 Exch. 470.

⁽²⁾ *Minchiner v. Martin*, 12 C. B. 455.

CHAPTER XXI.

CONSOLIDATING ACTIONS.

WHERE several actions are brought by the same plaintiff against the same defendant, on causes of action substantially the same, the court will, on application, stay the proceedings in all but one, especially if the proceedings are oppressive or vexatious.⁽¹⁾ If the other actions are in a different court, the court will stay all proceedings until those other actions are abandoned;⁽²⁾ if all in the same court, the actions will be consolidated.⁽³⁾ Thus, where several actions were brought on several guarantees securing one debt, and the defence was the same in all.⁽⁴⁾ Where, however, the defendants are different, it is not enough that one action will decide all the others.⁽⁵⁾; and so, where the plaintiffs are different.⁽⁶⁾ Where the actions are brought under a statute, the court may have no power to stay proceedings in all but one action.⁽⁷⁾

The rule is considered to be for the benefit of the defendant,⁽⁸⁾ and terms are generally imposed on him.⁽⁹⁾ Some-

(1) *Jones v. Prichard*, 6 D. & L. 529; *Haigh v. Paris*, 16 M. & W. 144.

(2) *Miles v. Bristol*, 3 B. & Ad. 946.

(3) *Ward v. Pomfret*, 1 M. & Gr. 559; 1 Sc. N. R. 403.

(4) *Sharp v. Lethbridge*, 4 M. & Gr. 37; 4 Sc. N. R. 722.

(5) *Corporation of Saltash v. Jackman*, 1 D. & L. 851; *Henry v. Nash*, 1 Exch. 826; *Newton v. Belcher*, 9 Q. B. 612; *Giles v. Tooth*, 3 C. B. 665. See, as to actions by one plaintiff on the same policy of insurance, *Hollingsworth v. Brodrick*, 4 A. & E. 646; *Corporation of Saltash v. Jackman*, 1 D. & L. 851.

(6) *Nicholls v. Lefevre*, 3 Dowl. 135; *Westbrook v. Australian &c. Company*, 14 C. B. 113. See post, "Staying Proceedings."

(7) *Ward v. Pomfret*, 1 Sc. N. R. 403.

(8) *Macgregor v. Horsfall*, 3 M. & W. 320.

(9) *Long v. Douglas*, 4 B. & Ad. 545. See a form of a consolidation rule in *Hollingsworth v. Brodrick*, 4 A. & E. 649.

times, the court will open the rule for the defendant, and allow a second action to be tried on terms.⁽¹⁾ Where the defendant obtains the verdict, the plaintiff however has not been restrained from trying a second action included in the rule, merely because the costs of the first were not paid; though, if he does so, he thereby forfeits the benefit of any terms imposed on the defendant.⁽²⁾ When the rule binds the defendant to abide by the event of the action, this includes proceedings in error, though, if error is brought, he may require to give security to abide by the decision in error.⁽³⁾ Where several actions against different defendants were consolidated, and they were bound to abide the event of one of them, this has been construed into a joint undertaking to pay the attorney's costs of that action.⁽⁴⁾

The application is made either to a judge at chambers or the court, and one rule or summons only is necessary, intituled in the various causes.⁽⁵⁾ It seems, the application may be made any time after appearance,⁽⁶⁾ and even has been allowed after notice of trial given.⁽⁷⁾ After judgment is signed by the plaintiff in the action tried, he obtains an order from a judge at chambers, for leave to enter up judgment and tax costs in the other actions, and issue execution in terms of the rule.

"Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court."⁽⁸⁾

⁽¹⁾ *Cohen v. Bulkeley*, 5 Taunt. 165; *Foster v. Allenby*, 3 Bing. N. C. 892, 896; 5 Dowl. 619.

⁽²⁾ *Ibid.*

⁽³⁾ *Hodson v. Richardson*, 3 Burr. 1477; *Gill v. Hindley*, 1 Moore, 79; *Alwyne v. Favine*, 2 N. R. 430.

⁽⁴⁾ *Anderson v. Boynton*, 19 L. J. 42, Q. B.

⁽⁵⁾ *Ward v. Pomfret*, 1 Sc. N. R. 410 n; 1 M. & Gr. 559.

⁽⁶⁾ *Hollingsworth v. Brodrick*, 4 A. & E. 646; 6 N. & M. 240.

⁽⁷⁾ *Ibid.*; *Booth v. Payne*, 1 Dowl. N. S. 348.

⁽⁸⁾ Rule Pr. 13, H. T. 1853.

CHAPTER XXII.

CLAIM OF CONUSANCE.

WHEN an action is brought in a superior court for a cause of which an inferior court of record has cognizance, either under a charter or statute or immemorial custom, the latter court may claim conusance; and if the claim is allowed, a transcript of the record is sent to such court. Thus, the universities have conusance in personal actions to a certain extent.⁽¹⁾ To sustain a claim of conusance, it must be shown that the inferior court is a court of record, and that the charter or statute provides a remedy in the circumstances.⁽²⁾

The claim must be made before plea.⁽³⁾ It is entered on a roll,⁽⁴⁾ and if the franchise is founded, not on an express charter, but immemorial custom, the entry must recite that the claim has been before allowed.⁽⁵⁾ The claim is made in court by motion, on the part of the bailiff, chancellor, or vice-chancellor, as the case may be; and there must be produced at the same time, an exemplification under the great seal of the charter, or the charter itself, or if there is a private statute, a copy thereof.⁽⁶⁾ In the case of the university making the claim, there must also be a certificate of the chancellor, and an affidavit as to the membership of the defendant.⁽⁷⁾ The affidavit in such a case is in general not allowed to be answered by counter affidavits.⁽⁸⁾

(1) *Williams v. Brickenden*, 11 East, 543; *Thornton v. Ford*, 15 East, 634.

(2) Ro. Abr. 489; Bac. Abr. "Courts, D. 3." See a form of the claim in *Broigne v. Renouard*, 12 East, 12.

(3) *Wells v. Trahern*, Barnes, 346; see a form of the claim in *Welles v. Trahern*, Willes, 233.

(4) *Paternoster v. Graham*, 2 Str. 810.

(5) *Foster v. Nutton*, 1 Salk. 183; 1 Lord Raym. 427.

(6) *Kendrick v. Kynaston*, 1 W. Bl. 454.

(7) See Bro. Abr. "Conusance;" *Dormer v. Howard*, 9 Jur. 737; see *Turner v. Bates*, 10 Q. B. 292, the latest instance of a claim of conusance.

(8) *Turner v. Bates*, 10 Q. B. 292.

CHAPTER XXIII.

CHANGE OF VENUE.

WHERE the plaintiff has laid the *venue* in his declaration in a particular county, the defendant may often desire to change it to a different county; and the plaintiff may seek to do so also.⁽¹⁾ "No *venue* shall be changed without a special order of the court or a judge, unless by consent of the parties."⁽²⁾ A committee of judges reported that the practice to be observed in future should be as follows :—

First, that it is more convenient, as a general rule, that the application to change the *venue* by rule or summons, should be made before issue joined, provided that this shall not prejudice either party from applying, after issue is joined, to lay the *venue* in another county, if it shall appear that it may be more conveniently tried in such county.

Secondly, that a *defendant*, in his affidavit to obtain the rule *nisi* to change the *venue*, or in support of a summons for that purpose before issue joined, should state all the circumstances on which he means to rely as the ground for the change of *venue*; but that he may, if he pleases, rely only on the fact that the cause of action arose in the county to which he seeks to have the *venue* changed, which ground shall be deemed sufficient, unless the plaintiff shows that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the *venue* should not be changed.⁽³⁾

Defendant applying on the common affidavit.—If the

(1) As to the privilege of an attorney in laying the *venue* see, *post*, "Attorneys."

(2) Rule Pr. 18, H. T. 1853.

(3) *Rothschild v. Shilston*, 8 Exch. 506; see *Begg v. Forbes*, 13 C. B. 616, as to the authority of these rules.

venue was not laid in the county where the cause of action arose, the defendant could, in many cases, apply to the court or a judge to change the *venue* to the county in which it arose on the common affidavit, i. e., an affidavit merely stating that the cause of action did not arise in the one county, but did arise in the other.⁽¹⁾ This could be done in actions for criminal conversation ; ⁽²⁾ for assault ; ⁽³⁾ for use and occupation ; ⁽⁴⁾ for negligent driving ; ⁽⁵⁾ on bills of exchange ; ⁽⁶⁾ and generally on contracts not by specialty. But the *venue* could not be so changed, if part of the cause of action did not arise in the county to which it was sought to be changed.⁽⁷⁾

The application on the common affidavit must still be made before plea pleaded.⁽⁸⁾ It cannot be made by a defendant under terms to take short notice of trial.⁽⁹⁾ A judge at chambers has power to set aside such an order.⁽¹⁰⁾ The application might be made by one of several defendants, without the consent of the others, it being for these to bring back the *venue*, if prejudiced.⁽¹¹⁾ The affidavit is generally made by the defendant himself, though the attorney or other person cognizant of the facts might make it.⁽¹²⁾

When the defendant applies on the common affidavit, the plaintiff may oppose the change of *venue*, on the ground that the cause will be more conveniently tried in the original *venue*. For this purpose he must state facts in his affidavit which lead to this conclusion.

Form of the Common Affidavit.

[*Title of court and cause.*]

I, C. D., of _____, [or D. A. of _____, attorney in this action for] the above-named defendant, make oath and say that the plaintiff's cause of action (if any) arose in the county of W. and not in the county of V., or elsewhere, out of the county of W.

Sworn, &c.

C. D.

(1) *Jones v. Pearce*, 2 Dowl. 54; *ibid.* 566; *Chiles v. Bradley*, 13 C. B. 604.

(2) *Guard v. Hodge*, 10 East, 32.

(3) *Shepherd v. Hall*, 2 Chitt. R. 417.

(4) *Herring v. Watts*, 2 D. & L. 609; 8 Sc. N. R. 755.

(5) *Williams v. Land*, 4 Taunt. 729.

(6) *Mondel v. Steele*, 8 M. & W. 644; but not on cheques, *Webb v. Inwards*, 5 C. B. 483.

(7) *Butler v. Fox*, 7 C. B. 970.

(8) *Begg v. Forbes*, 13 C. B. 614.

(9) *Chiles v. Bradley*, 13 C. B. 604.

(10) *Darrington v. Price*, 6 C. B. 309.

(11) *Job v. Butterfield*, 5 Exch. 827.

(12) *Williams v. Higgs*, 6 M. & W. 133.; 8 Dowl. 165.

Defendant applying on special grounds.—The defendant, instead of relying on the common affidavit in those cases in which he can do so, and in other cases where such affidavit is inapplicable, may apply on special grounds; and he should state in his affidavit all the circumstances on which he intends to rely, for there must be in general strong grounds for taking away from the plaintiff his natural right to control the venue.⁽¹⁾ This application has been allowed in cases of political excitement in the locality;⁽²⁾ when expense could be saved;⁽³⁾ that a view might be obtained;⁽⁴⁾ that the trial might take place sooner for the defendant who had been rendered by his bail;⁽⁵⁾ that witnesses might be able to attend who would otherwise be absent from the county.⁽⁶⁾ Where the ground is that the trial may take place nearer where the witnesses reside, the defendant must show what, and how many, witnesses he intends to call.⁽⁷⁾ The plaintiff may, in opposing the application, show a balance of conveniences in retaining the original venue as regards his own witnesses.⁽⁸⁾ Where to a libel no justification is pleaded, it is not sufficient to show that the witnesses in mitigation reside in another county.⁽⁹⁾

Where an issue had been ordered to be tried, and the plaintiff opposed the change from Middlesex to Sussex, on the ground of being an attorney of the court, the objection was held inapplicable.⁽¹⁰⁾

This application may be made by the defendant either before or after issue joined.⁽¹¹⁾ He should show in his affidavit the nature of the action and his defence.⁽¹²⁾ In

⁽¹⁾ *Bucknell v. Phillips*, 7 Scott, 274; *Coleman v. Foster*, 1 L. M. & P. 753.

⁽²⁾ *Anon. Lofft*, 99; *Pybus v. Scudamore*, 7 Sc. 124; *Seeley v. Ellison*, 6 Bing. N. C. 229; 8 Dowl. 266.

⁽³⁾ *Alcock v. Cook*, 6 Bing. 733; *Pugh v. Kerr*, 6 M. & W. 17.

⁽⁴⁾ *Hodinot v. Cox*, 8 East, 268; *Pybus v. Scudamore*, 7 Sc. 124.

⁽⁵⁾ *Keys v. Smith*, 10 Bing. 1; 3 M. & Sc. 338; 2 Dowl. 210.

⁽⁶⁾ *Atkinson v. Sadlier*, 2 Chitt. R. 419.

⁽⁷⁾ *Evans v. Weaver*, 1 B. & P. 20; *Hains v. Pawlett*, 5 C. B. 806; *Smallcombe v. Williams*, 7 C. B. 77.

⁽⁸⁾ *Flicke v. Godfrey*, 1 T. R. 782; *Holmes v. Wainwright*, 3 East, 329; *Higgins v. Houseman*, 3 Dowl. 549.

⁽⁹⁾ *Wheatcroft v. Mouseley*, 11 C. B. 677.

⁽¹⁰⁾ *Robertson v. Haynes*, 16 C. B. 554.

⁽¹¹⁾ Thus, in an action on a specialty, this was done before issue joined, *Pashley v. Mayor of Birmingham*, 14 C. B. 421. It should be made as speedily as possible after issue joined, *Hains v. Pawlett*, 5 D. & L. 780.

⁽¹²⁾ *Watt v. Daniel*, 1 B. & P. 425; *Thornhill v. Oastler*, 7 Sc. 272; *Johnson v. Beresford*, 2 Cr. & M. 222.

general, it is better not to apply till after issue joined, for then the court will have better materials for judging.⁽¹⁾ The defendant may, it seems, apply though bound to try at a particular sittings.⁽²⁾ The application may be made to the court, but is generally made to a judge at chambers. Terms are frequently imposed on the defendant when the application is granted, so as to protect the plaintiff against disadvantage,⁽³⁾ as by making the defendant pay any extra expense the plaintiff may incur,⁽⁴⁾ or by binding the defendant to make certain admissions.⁽⁵⁾

Form of Affidavit on Special Grounds.

[*Title of court and cause.*]

I, D. A., &c. [*or C. D., &c.*] make oath and say—

1. That this action is brought for [*state shortly the object of the action*], and the plaintiff declared herein, on the day of last, laying the venue in the county of V., and the said declaration contains counts for, &c.

2. That the defendant, on , pleaded to the said declaration [*state shortly the pleas.*]

3. That issue was joined in this action on last.

4. That the defendant has a good defence on the merits, as I am instructed [*or advised*] and verily believe.

5. [*State the grounds of the application as to the number and residence of the witnesses, &c.*]

Plaintiff applying.—In transitory actions, the plaintiff may apply to amend his declaration, by changing the venue on stating to the court reasonable grounds, and this is generally allowed of course,⁽⁶⁾ even, it seems, after issue joined.⁽⁷⁾ In local actions the plaintiff may also, to prevent delay or expense, apply to change the venue to a neighbouring county, for which purpose he obtains leave to enter a suggestion in the issue. Thus “in any action, the venue in which is local, the court in which such action

⁽¹⁾ *Begg v. Forbes*, 13 C. B. 614; *Hodge v. Churchward*, 5 C. B. 496.

⁽²⁾ *Johnson v. Nevison*, 2 Dowl. 260. But see *Haythorn v. Birch*, *id.* 240.

⁽³⁾ *Bourring v. Bignold*, 1 Dowl. 685.

⁽⁴⁾ *Keys v. Smith*, 10 Bing. 1; *Wing v. Jenkins*, 7 Moore, 62; *Attwood v. Ridley*, 2 M. & Gr. 893; 3 Sc. N. B. 319.

⁽⁵⁾ *Hodinott v. Cox*, 8 East, 268.

⁽⁶⁾ *Fife v. Bousfield*, 2 Dowl. N. S. 705; *Coleman v. Foster*, 1 L. M. & P. 753.

⁽⁷⁾ *Cook v. Shone*, Barnes, 12, 19.

shall be depending, or any judge of the said courts may, on the application of either party, order the issue to be tried or writ of inquiry to be executed in any other county or place than that in which the venue is laid, and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had or writ of inquiry executed in the county or place where the same is ordered to take place."⁽¹⁾

This application cannot be made till after issue joined.⁽²⁾ So, to prevent a partial trial, the application must be made after issue joined.⁽³⁾

Form of Suggestion in Issue in Local Actions.

[*After joinder of issue conclude thus*] :—And now, on the day of , A. D. , it is suggested and manifestly appears to the court here, that the trial of the said issue [*or issues*], above joined between the parties aforesaid, may be more conveniently had in the county of than in the county of , therefore, according to the statute in such case made and provided, let a jury of the said county of come, &c.

In actions, transitory or local, where the venue is laid in a city or town, leave is given, by statute, to the court or judge, on the application of either party, to change the venue to the adjoining county, for which purpose a suggestion is entered on the issue.⁽⁴⁾

Form of Issue and Suggestion.

And hereupon the plaintiff (*or defendant*), prays the court here that the issue (*or issues*) above joined between the said parties may be tried in the county of , being the county next adjoining to the city [*or town and county*] of aforesaid, and not within the same city [*or town and county*], according to the statute in such case made and provided, and it is granted to him, &c. Therefore let a jury of the said county of come, &c.

⁽¹⁾ *Bell v. Harrison*, 4 Dowl. 181; 2 C. M. & R. 733.

⁽²⁾ *Tolson v. Bishop of Carlisle*, 7 C. B. 79.

⁽³⁾ 3 & 4 Will. 4, c. 42, s. 22. See as to what was considered a local action in *Simmons v. Lillystone*, 8 Exch. 431.

⁽⁴⁾ 38 Geo. 3, c. 52, s. 1.

CHAPTER XXIV.

PLEAS IN ABATEMENT AND PRELIMINARY PLEAS.

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| 1. Nonjoinder.
(a) Amendment after non-joinder pleaded.
2. Misnomer.
3. Privilege of attorney.
4. When plea in abatement must be pleaded. | 5. Affidavit.
6. How pleaded.
7. Replication, &c.
8. Judgment.
9. Costs. |
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THERE are certain preliminary or dilatory pleas which may be pleaded by a defendant after he has appeared, and the declaration has been delivered or filed, and which must be pleaded, if at all, before any plea in bar to the action. He must first plead to the jurisdiction.⁽¹⁾ Then he may plead in abatement on some ground connected with the person of the plaintiff⁽²⁾ or defendant, then on some ground connected with the form of the count or declaration. The effect of these pleas is either to delay the plaintiff, or to prevent him altogether from proceeding with that particular action, and they are not allowed except there is an affidavit to verify them. The courts lean against such pleas; and if the defendant is under terms to plead issuably, he will not be allowed to plead in abatement.⁽³⁾ A defendant may plead in abatement as to one or more counts of a declaration, and in bar as to others; or he may plead in abatement as to part of the cause of action contained in one count, and in bar as to the residue.⁽⁴⁾ The plea in abatement, however, need not show to what count or part of a count it is pleaded.⁽⁵⁾

1. Nonjoinder.

Nonjoinder of co-plaintiffs.]—The proceedings as to nonjoinder of plaintiffs are stated under the head of “Amendment,” *post*.

(¹) See such a plea, *Munden v. Duke of Brunswick*, 4 C. B. 321.

(²) *De Wahl v. Braune*, 6 June, 1856, Exch.; where the defendant pleaded that the plaintiff was a married woman and her husband an alien enemy.

(³) *Shepeler v. Durant*, 14 C. B. 582.

(⁴) *Hill v. White*, 6 Bing. N. C. 26; 8 Dowl. 13.

(⁵) *Rhodes v. Turner*, 3 Exch. 607. It should not be pleaded merely to damage instead of to the cause of action, *Robinson v. Marchant*, 7 Q. B. 918.

Nonjoinder of defendants.—A plea in abatement for nonjoinder of a co-proprietor or co-partner cannot be pleaded to an action against one or more common carriers for loss or injury to any parcel, package, or person.⁽¹⁾ Nor is such a plea, that another partner has not been also proceeded against, allowed to a *scire facias* issued on a judgment recovered against a public officer of a banking co-partnership under 7 Geo. 4, c. 46.⁽²⁾ And “no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be *stated* in such *plea* that such person is *resident* within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea.”⁽³⁾ The plea must state all the contracting parties, for the object is to give the plaintiff a better writ; ⁽⁴⁾ and if any one of them is resident out of the jurisdiction, the plea cannot be pleaded.⁽⁵⁾ The residence means the domicile or permanent abode of the party⁽⁶⁾ at the time of the plea pleaded.⁽⁷⁾

“To any plea in abatement in any court of law of the nonjoinder of another person, the plaintiff *may reply* that such person has been discharged by *bankruptcy* and certificate, or under an act for the relief of insolvent debtors.”⁽⁸⁾

“In all cases in which, after such plea in abatement, the plaintiff shall, without having proceeded to trial upon an issue thereon, commence *another action against the defendant* or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea of abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or in the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement, or any subsequent plea in

⁽¹⁾ 11 Geo. 4 & 1 Will. 4, c. 68, s. 5.

⁽²⁾ *Fowler v. Rickerby*, 3 Sc. N. R. 138; 9 Dowl. 682; *Nunn v. Lomer*, 3 Exch. 471; *Esdaile v. Trustwell*, 2 Exch. 312. See a plea in abatement to *sci. fa.*, to repeal a patent that the interest in the patent had been assigned, held bad, *R. v. Betts*, 15 Q. B. 540.

⁽³⁾ 3 & 4 Will. 4, c. 42, s. 8.

⁽⁴⁾ *Hill v. White*, 6 Bing. N. C. 26; 8 Dowl. 13; *Crellin v. Brook*, 14 M. & W. 11.

⁽⁵⁾ *Joll v. Curzon*, 4 C. B. 249; *Newton v. Stewart*, 4 D. & L. 89.

⁽⁶⁾ *Lambe v. Smythe*, 15 M. & W. 433; 3 D. & L. 712. And not the place of business, *Maybury v. Mudie*, 5 C. B. 283.

⁽⁷⁾ *White v. Gascoigne*, 6 D. & L. 225; 3 Exch. 36.

⁽⁸⁾ 3 & 4 Will. 4, c. 42, s. 9.

abatement, are not liable as a contracting party or parties, the plaintiff shall, nevertheless, be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants, who shall have so pleaded in abatement the nonjoinder of such person, provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.⁽¹⁾ This provision does not apply to a plea of coverture in abatement.⁽²⁾ If, at the trial of an issue joined on such a plea, it appear that the Statute of Limitations has run against the party named in the plea as nonjoined, the issue must be found against the defendant so pleading.⁽³⁾

Form of Plea of Nonjoinder.

In the Q. B. ["C. P.," or "Exch. of P."]

The day of , A. D. 18 .

C. D. } And the defendant, by D. A., his attorney, prays judgment of the said writ and declaration, and that the same
 } may be quashed, because, he says, that the said alleged
 A. B. } debt was contracted by, and became, and was, due and payable from
 } the defendant jointly with one E. F., who is still living, and who, at
 } the commencement of this suit was, and still is, resident within the
 } jurisdiction of the court, and not by the defendant alone, and this the
 } defendant is ready to verify. Wherefore, inasmuch as the said E. F.
 } is not joined in the said writ and declaration, together with the defen-
 } dant, the defendant prays judgment of the said writ and declaration,
 } and that the same may be quashed.⁽⁴⁾

(a) *Amendment after pleading nonjoinder of co-defendants.]*

—"In any action on contract, where the nonjoinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty without any order to amend the writ of summons and the declaration, by adding the name or names of the person or

(1) 3 & 4 Will. 4, c. 42, s. 10.

(2) *Jones v. Smith*, 3 M. & W. 526; 6 Dowl. 557.

(3) 9 Geo. 4, c. 14, s. 2.

(4) It seems the provisions in the C. L. P. Act, 1852, ss. 66, 67, do not apply to the form of a plea in abatement; and hence the prayer is still necessary, *Whitling v. Des Anges*, 3 C. B. 910; 4 D. & L. 678. See also *Davies v. Thompson*, 14 M. & W. 161.

persons named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement; provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the plaintiff, be considered for all purposes as the commencement of the action.”⁽¹⁾ “In all cases in which, after a plea in abatement of the nonjoinder of another person as defendant, the plaintiff shall, without having proceeded to trial on the issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, or shall amend by adding the omitted defendant or defendants, the commencement of the declaration shall be in the following form, or to the like effect:—

[*Verbe*] “A. B., by E. F., his attorney [*or in his own proper person, &c.*], sues C. D. and G. H., which said C. D. has heretofore pleaded in abatement the nonjoinder of the said G. H., for &c.”⁽²⁾

“In all cases after such plea in abatement and amendment, if it appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original defendant or defendants, the original defendant or defendants shall be entitled, as against the plaintiff, to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original defendant, or any of the original defendants, is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the plaintiff shall, nevertheless, be entitled to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause against the original defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person: provided that any such defendant, who shall have so pleaded in abatement, shall be at liberty

(1) C. L. P. Act, 1852, s. 38.

(2) *Ibid.* s. 60.

on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement."⁽¹⁾

See also as to amending before or at the trial, by striking out the name of a co-defendant misjoined, *post*, "Amendment."

2. *Misnomer of Defendants.*

"No plea in abatement for a misnomer shall be allowed in any personal action, but in all cases in which a misnomer would, but for this act, have been by law pleadable in abatement, in such actions the defendant shall be at liberty to cause the declaration to be amended at the costs of the plaintiff by inserting the right name upon a judge's summons, founded on an affidavit of the right name, and in case such summons shall be discharged, the cost of such application shall be paid by the party applying, if the judge shall think fit."⁽²⁾ In actions on bills of exchange and written instruments, where the party has signed his christian name by initials, it is enough in the declaration to designate such party by such initial for the christian name.⁽³⁾

3. *Plea of Privilege of Attorney.*

If an attorney is sued in any other court than that of which he is an attorney he may plead his privilege; which is not a plea to the jurisdiction.⁽⁴⁾ The plea must be verified by affidavit.⁽⁵⁾

4. *When Plea in Abatement Plead.*

The defendant must enter an appearance before he can plead in abatement,⁽⁶⁾ and the plea cannot be delivered before the plaintiff has declared;⁽⁷⁾ and it seems, if the declaration has been filed, the defendant should first take it

⁽¹⁾ C. L. P. Act, 1852, s. 39. See 3 & 4 Will 4, c. 42, s. 10; *ante*, p. 879.

⁽²⁾ 3 & 4 Will. 4, c. 42, s. 11. ⁽³⁾ *Ibid.* s. 12.

⁽⁴⁾ *Hunter v. Neck*, 3 M. & Gr. 181; 3 Sc. N. R. 448. See also *Groom v. Wortham*, 5 Sc. N. R. 799; 2 Dowl. N. S. 657; *Walford v. Fleetwood*, 14 M. & W. 449; *Percival v. Cook*, 5 M. & W. 293; 1 Dowl. 500.

⁽⁵⁾ *Davidson v. Watkins*, 3 Dowl. 129; Bing. N. C. 297.

⁽⁶⁾ *Wakefield v. Marden*, 2 Chitt. R. 8; *Saunders v. Owen*, 2 D. & R. 252.

⁽⁷⁾ *Douglas v. Green*, 2 Chitt. R. 7; *Beaver v. Kemp*, 1 Cr. & J. 287; 1 Dowl. 281; 1 Tyr. 260.

out of the office.⁽¹⁾ The plea in abatement must be pleaded within four days after the day of filing or delivery of the declaration, *i. e.* exclusive of the latter day.⁽²⁾ If the defendant plead an abatement after the above time, the plea is a nullity, and judgment may be signed when the time for pleading in bar has expired.⁽³⁾ The court, however, has allowed a plea in abatement after this period, where a second action was vexatiously brought for the same cause.⁽⁴⁾

5. Affidavit.

An affidavit verifying the plea is necessary,⁽⁵⁾ and the want of one makes the plea a nullity, and judgment may be signed by the plaintiff;⁽⁶⁾ or at least such a plea is an irregularity,⁽⁷⁾ though the plaintiff may waive it by replying.⁽⁸⁾ The affidavit cannot regularly be sworn before the defendant's attorney; and, perhaps, the plea would be set aside on that ground.⁽⁹⁾ Nor is it regular to have the affidavit sworn before the declaration is delivered,⁽¹⁰⁾ though it may be so on the day of filing the declaration,⁽¹¹⁾ and before the date of the plea.⁽¹²⁾ If it be not annexed to the plea, it must be correctly intitled in the cause, otherwise it may be treated as a nullity;⁽¹³⁾ and it must state the facts specially.⁽¹⁴⁾ It is, however, generally annexed to the plea, in which case it need not be intitled in the cause.⁽¹⁵⁾ The affidavit may be made by a third person.⁽¹⁶⁾ Where the

⁽¹⁾ *Ibid.*; *Bond v. Smart*, 1 Chitt. R. 735.

⁽²⁾ *Ryland v. Wormland*, 5 Dowl. 581. And if the last of the four days is Sunday, &c. the time is extended to Monday: Rule Pr. 175, H. T. 1853.

⁽³⁾ *Brandon v. Payne*, 1 T. R. 689.

⁽⁴⁾ *Sowler v. Dunston*, 1 M. & R. 508. See also *Milner v. Milnes*, 3 T. R. 627.

⁽⁵⁾ 4 Anne, c. 16, s. 11.

⁽⁶⁾ *Lovell v. Walker*, 9 M. & W. 229; 1 Dowl. N. S. 952.

⁽⁷⁾ *Maybury v. Mudie*, 5 C. B. 283; *Fletcher v. Lechmere*, 2 Dowl. N. S. 848; *Newton v. Stewart*, 15 L. J. Q. B. 384; 4 D. & L. 89.

⁽⁸⁾ *Graham v. Ingleby*, 1 Exch. 651; 5 D. & L. 737.

⁽⁹⁾ *Horsefull v. Matthewman*, 3 M. & Sel. 154.

⁽¹⁰⁾ *Bower v. Kemp*, 1 Cr. & J. 287; 1 Dowl. 693; *Johnson v. Popplewell*, 2 Cr. & J. 545; 2 Tyr. 715.

⁽¹¹⁾ *Lang v. Comber*, 4 East, 348.

⁽¹²⁾ *Poole v. Pembrey*, 1 Dowl. 693.

⁽¹³⁾ *Ibid.*; *Munden v. Duke of Brunswick*, 4 C. B. 321; *Fletcher v. Lechmere*, 5 M. & Gr. 265; 2 Dowl. N. S. 848.

⁽¹⁴⁾ *Dobbin v. Wilson*, 3 N. & M. 260.

⁽¹⁵⁾ *Prince v. Nicholson*, 5 Taunt. 333; 1 Marsh. 70.

⁽¹⁶⁾ *Anon.* 1 Chitt. R. 58.

plea is one of nonjoinder of a co-defendant, the affidavit must state, with reasonable certainty, the residence of such co-defendant at the time of plea pleaded ;⁽¹⁾ and if it incorrectly state this, the plea may be set aside for irregularity.⁽²⁾

Form of Affidavit.

In the Q. B. ["C. P.," or "Exch. of P."]

Between A. B. plaintiff,
and
C. D. defendant.

I, C. D., of , the above-named defendant, make oath and say, that the plea hereunto annexed is true in substance and in fact [*if the plea is nonjoinder, add:* and that E. F., in the said plea named, resides at No. in street, in the parish of and county of .]
Sworn, &c. C. D.

6. How Pleaded.

Pleas in abatement may generally be pleaded like other pleas, by attorney or guardian. A plea to the jurisdiction must, however, be pleaded in person.⁽³⁾ A *feme covert* must also plead her coverture in person.⁽⁴⁾ The plea is engrossed on plain paper, and delivered along with the affidavit, either annexed or separate.

7. Replication, &c.

The plaintiff replies or demurs to the plea in abatement as in other cases.⁽⁵⁾ If the plaintiff can do neither successfully, he should enter a *cassetur breve*,⁽⁶⁾ or in case the plea is nonjoinder he may amend, as stated *ante*, p. 880. The plaintiff cannot, however, new assign.⁽⁷⁾ If an issue in fact be joined, it is made up, and trial proceeded with as in other cases.

8. Judgment.

When judgment is given for the plaintiff on a verdict

⁽¹⁾ See *ante*, p. 879.

⁽²⁾ *Maybury v. Mudie*, 5 C. B. 283.

⁽³⁾ Bac. Abr. "Abatement," 2. See *Hunter v. Neck*, 3 M. & Gr. 181; 3 Sc. N. R. 452.

⁽⁴⁾ 2 Saund. 209 a.

⁽⁵⁾ See *Esdaile v. Lund*, 12 M. & W. 607; 1 D. & L. 565; *Ryalls v. Bramall*, 1 Exch. 734.

⁽⁶⁾ See *ante*, p. 853.

⁽⁷⁾ *Hill v. White*, 6 Bing. N. C. 26; 8 Sc. 249; 8 Dowl. 13.

under a plea in abatement, it is one of *quod recuperet*, i. e. a final judgment ;⁽¹⁾ and hence, if damages be the object of the action, and the jury omit to assess them, there can be no writ of inquiry but a trial *de novo* only.⁽²⁾ If judgment be for the plaintiff on demurrer to the plea, the judgment is respondeat ouster only.⁽³⁾ After this judgment the defendant had, previous to the Common Law Procedure Act, 1852, s. 63, only four days to plead in bar ;⁽⁴⁾ and it seems doubtful whether this law is altered. The plea in abatement and judgment of respondeat ouster need not, it seems, be entered on the second issue or *nisi prius* record.⁽⁵⁾

If judgment is given for the defendant, whether after verdict or demurrer, it must be one that the writ be quashed.⁽⁶⁾

9. Costs.

When the plaintiff on a verdict has a judgment of *quod recuperet* he is entitled to his costs ; and so is a defendant if he succeed.⁽⁷⁾ Where the plaintiff enters a *cassetur breve*, or confesses the plea to be true, he is not bound to pay costs.⁽⁸⁾ Where the defendant pleads nonjoinder of a co-defendant, and the plaintiff amends and proceeds to trial, the regulation as to costs is stated *ante*, p 881. Where the defendant pleads nonjoinder of a co-plaintiff, the plaintiff may, on paying costs occasioned thereby, amend.⁽⁹⁾ If judgment has been given on demurrer for either party, such party is entitled, by statute, to his costs in that behalf, on pleas of abatement as in other cases.⁽¹⁰⁾

⁽¹⁾ *Bowen v. Shapcott*, 1 East, 542.

⁽²⁾ *Eichorn v. Lemaitre*, 2 Wils. 367.

⁽³⁾ *Bowen v. Shapcott*, 1 East, 542. See also *Phillips v. Claggett*, 10 M. & W. 102 ; 2 Dowl. N. S. 258.

⁽⁴⁾ *Cantwell v. Earl of Stirling*, 8 Bing. 177 ; 1 M. & Sc. 365.

⁽⁵⁾ See *Pepper v. Whalley*, 5 N. & M. 437 ; 1 Har. & W. 480.

⁽⁶⁾ Bac. Abr. "Abatement," P. ; Gib. C. B. 52. See *Whitling v. Des Anges*, 3 C. B. 910.

⁽⁷⁾ *Hullock*, 126.

⁽⁸⁾ *Greenhill v. Sheppard*, 12 Mod. 145 ; *Allen v. Mozey*, 1 Barnes, 92.

⁽⁹⁾ See *post*, "Amendment."

⁽¹⁰⁾ 3 & 4 Will. 4, c. 42, s. 34 ; *Bentley v. Davies*, 10 Exch. 347 ; Gray on "Costs," 87.

CHAPTER XXV.

PLEA PUIS DARREIN CONTINUANCE.

"A PLEA containing a defence, arising after the commencement of the action, may be pleaded together with pleas of defences arising before the commencement of the action, provided that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause up to the time of the pleading of such first mentioned pleas;" but this rule does not apply to one of several defendants.⁽¹⁾ Where a plea of payment of the sum claimed after action brought is pleaded, care should be taken to include the costs, otherwise the plaintiff is entitled to go on with the action, and will recover nominal damages, being entitled to his costs.⁽²⁾ Where, however, a defendant has already pleaded, it sometimes happens that a matter of defence afterwards arises which it is desirable to make available; and this may be done by a plea *puis darrein continuance*, which may be pleaded before the jury have actually returned their verdict.⁽³⁾ Thus he may plead a release,⁽⁴⁾ accord and satisfaction,⁽⁵⁾ that plaintiff has become an alien enemy,⁽⁶⁾ bankruptcy of the plaintiff,⁽⁷⁾ or of the defendant,⁽⁸⁾ an award,⁽⁹⁾ judgment recovered for the same cause of action.⁽¹⁰⁾

(1) Rules Pl. 22, 23, T. T. 1853.

(2) *Cook v. Hopewell*, 11 Exch. 555. See also *Kemp v. Ball*, 10 Exch. 607; *Goodwin v. Cremer*, 18 Q. B. 757.

(3) *Todd v. Emly*, 1 Dowl. N. S. 598; 9 M. & W. 606.

(4) *Wright v. Burrows*, 4 D. & L. 226.

(5) *Flockton v. Hall*, 14 Q. B. 380.

(6) *Alcenous v. Nigreu*, 4 E. & B. 217.

(7) *Brethertone v. Osborne*, 1 Dowl. 457.

(8) *Todd v. Maxfield*, 6 B. & C. 105; 9 D. & R. 171, where it was held, if he did not plead it before verdict, he could not do so to an action on the judgment.

(9) *Storey v. Bloxam*, 2 Esp. 505; *Lewis v. Kermode*, 2 Moore, 31.

(10) *Minshull v. Evans*, 4 C. & P. 555.

So, if an executor, he may plead judgment recovered against him since plea pleaded.⁽¹⁾ In ejectment he may plead entry of the plaintiff on part of the premises.⁽²⁾ A set-off cannot be thus pleaded.⁽³⁾ Where two actions were brought on a bill of exchange against the drawer and acceptor, and the drawer paid the debt and costs, it was held the acceptor could not plead this as a plea of the further maintenance.⁽⁴⁾ Execution against the garnishee out of the Lord Mayor's Court may be so pleaded in an action.⁽⁵⁾ The plea may be pleaded, though the defendant is under terms to plead assuably and take short notice of trial,⁽⁶⁾ or though the trial had been entered as undefended and postponed,⁽⁷⁾ or though judgment had been given for the plaintiff on an issue of *nil tiel record*, there being another issue still to be tried;⁽⁸⁾ but it cannot be pleaded after a verdict;⁽⁹⁾ and if it is pleaded after a demurrer and joinder in demurrer, it operates as a *retraxit* of the demurrer.⁽¹⁰⁾

"In cases in which a plea *puis darrein continuance* has heretofore been pleadable in *banc* or at *nisi prius*, the same defence may be pleaded, with an allegation that the matter arose after the last pleading; and such plea may, when necessary, be pleaded at *nisi prius* between the 10th of August and the 24th of October, but no such plea shall be allowed, unless accompanied by an *affidavit* that the matter thereof arose *within eight days* next before the pleading of such plea, or unless the court or a judge shall otherwise order."⁽¹¹⁾ Thus the court allowed the plea after eight days, where the defendant had become a bankrupt, and the delay had arisen from no culpable conduct on his part.⁽¹²⁾

Affidavit.]—An affidavit of the truth of the plea is absolutely necessary.⁽¹³⁾ The court have allowed the plea,

(1) *Prince v. Nicholson*, 5 Taunt. 333, 665; 1 Marsh. 70, 280; *Lyttelton v. Cross*, 3 B. & C. 317.

(2) *Moore v. Hawkins*, Yelv. 180; Cro. Jac. 261. See *Doe v. Brewer*, 2 Chitt. R. 323; 4 M. & Sel. 301.

(3) *Richards v. James*, 2 Exch. 471.

(4) *Randall v. Moon*, 12 C. B. 261.

(5) *Webb v. Hurrell*, 4 C. B. 287.

(6) *Bryant v. Terring*, 5 Bing. 414; 2 M. & P. 760.

(7) *Whitmore v. Bantock*, 1 M. & M. 122.

(8) *Wagner v. Imbrie*, 6 Exch. 380; 2 L. M. & P. 333.

(9) *Lovell v. Eastaff*, 3 T. R. 554.

(10) *Soloman v. Graham*, 24 L. J. 332, Q. B.; *Stoner v. Gibbons*, Moore, 871. See also *Wagner v. Imbrie*, 2 L. M. & P. 333.

(11) C. L. P. Act, 1852, s. 69.

(12) *Dunn v. Loftus*, 8 C. B. 76.

(13) *Powell v. Duncan*, 5 Dowl. 550.

though the matter did not arise within eight days next before the pleading, where one of the defendants had been made bankrupt and the defendants understood the plaintiff did not intend to prosecute the action.⁽¹⁾ Where the plea is pleaded at *nisi prius*, the subject-matter arising during the trial, the judge may dispense with an affidavit.⁽²⁾ But if an affidavit is necessary at *nisi prius*, it should be sworn before one of the judges of assize.⁽³⁾

How pleaded.—When pleaded during the action in *banc*, the plea is delivered to the opposite attorney with the necessary affidavit. If the plea can be pleaded at *nisi prius*, it may be delivered to the judge⁽⁴⁾ any time before the verdict has been given, and the attorney afterwards transcribes it on the *nisi prius* record,⁽⁵⁾ and it is returned to the court above,⁽⁶⁾ when the plaintiff may reply or demur to the plea. If the eight days are likely to elapse before the cause is called, it should be tendered to the judge before such time.⁽⁷⁾ The judge has no discretion to refuse it.⁽⁸⁾ If one of several defendants plead a plea of bankruptcy at *nisi prius*, the plaintiff cannot confess such plea and go on with the trial as to the other defendants.⁽⁹⁾

Form of Plea in Banc.

[*Title of court.*]

The day of A. D. .

D. } The defendant, by , his attorney, says, that after
ats. { the last pleading in this action and before this day [here
B. } state the plea as the case may be.]

Plea at Nisi Prius.

[*Title of court.*]

The day of A. D. .

D. } And now at this day, before the Right Hon. Sir ,
ats. { assigned to hold pleas in Her Majesty's court of comes
B. } the defendant by , his counsel, and says that after the
last pleading in this action, &c.

(1) *Kibblethwaite v. Reynolds*, 7 Sc. 232; *Dunn v. Loftus*, 8 C. B. 76; 7 D. & L. 158.

(2) *Todd v. Emly*, 1 Dowl. N. S. 598; 9 M. & W. 606.

(3) *Bartlett v. Leighton*, 3 C. & P. 408; and the judge will allow it to be resworn, if sworn before a wrong officer.

(4) *Payne v. Shenstone*, 4 D. & L. 396.

(5) *Myers v. Taylor*, Ry. & M. 404; 2 C. & P. 306.

(6) *Corporation of Ludlow v. Tyler*, 7 C. & P. 587; *Abbott v. Rugeley*, 2 Mod. 307.

(7) *Townsend v. Smith*, 1 C. & K. 160.

(8) *Todd v. Emly*, 1 Dowl. N. S. 598.

(9) *Pascall v. Horsley*, 3 C. & P. 372.

Plea at the Assizes.

— before the right Hon. Sir and Sir , Justices of our Lady the Queen, assigned to take the assizes in and for the county of aforesaid, comes, &c.

Effect of plea, and setting it aside.]—It is said a plea *puis darrein continuance* can only be once pleaded.⁽¹⁾ It supercedes or waives the former pleading,⁽²⁾ and hence, ought not to be used unless the defence it furnishes is better. Where the matter arose after the commencement of the action, but in time to be pleaded with the other pleas, the plaintiff may confess such plea, and is thereupon entitled to the costs of the cause up to the date of pleading.⁽³⁾ The court has, however, allowed the plea to be withdrawn after the plaintiff confessed it, and the action to go on on the old pleas.⁽⁴⁾ If the plea *puis darrein continuance* be pleaded for delay, it seems the judge at *nisi prius*, or the opposite attorney, must still receive it,⁽⁵⁾ though it is clearly bad on the face of it.⁽⁶⁾ If the plea is used for the mere purpose of delay, and the plaintiff demur to it, the judge may order the demurrer to be argued on the first paper day in term.⁽⁷⁾ If there was fraud in obtaining the release pleaded, the court will, in many cases, set the plea aside.⁽⁸⁾ Thus, where a pauper plaintiff, behind his attorney's back, to deprive the latter of costs, gave a release to the defendant who pleaded it, it was set aside at the instance of the attorney.⁽⁹⁾

Amendment.]—If the plea is in bar, it seems that it may be amended as in other cases.⁽¹⁰⁾ When the plea is pleaded in *banc*, the court, on allowing amendment, may impose the terms of taking short notice of trial.⁽¹¹⁾ So as to a plea pleaded at *nisi prius*.⁽¹²⁾

(1) Bro. Abr. "Continuance," 5, 41; 1 Salk. 178.

(2) *Barber v. Palmer*, 1 Salk. 178; *Dunn v. Hill*, 11 M. & W. 470.

(3) Rule Pl. 22, T. T. 1853, *ante*, p. 886.

(4) *Plummer v. Hedge*, 24 L. J. 24, Q. B.

(5) *Corporation of Ludlow v. Tyler*, 7 C. & P. 537.

(6) *Paris v. Salkeld*, 2 Wils. 137; *Fitch v. Toulmin*, 1 Stark. 62. See Bull's N. P. 309.

(7) *Fitch v. Toulmin*, 1 Stark. 62; *Great Northern Railway Company v. Kennedy*, 10 L. J. 11 Exch.; *Hall v. Popplewell*, 5 M. & W. 341.

(8) *Innell v. Newman*, 4 B. & Ald. 419; *Rawstorne v. Gandell*, 15 M. & W. 304; *Jones v. Bonner*, 2 Exch. 230. See *ante*, p. 197.

(9) *Wright v. Burroughs*, 3 C. B. 344.

(10) *Holroyd v. Reed*, 1 Dav. & M. 483.

(11) *Lindo v. Simpson*, 2 Smith, 659.

(12) *Holroyd v. Reed*, 5 Q. B. 594.

Costs..]—When one of several pleas contains a defence arising after the commencement of the action, and the plaintiff confesses it, he is entitled to the costs of the cause up to the time of pleading.⁽¹⁾ “When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause up to the time of pleading such plea : provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants.”⁽²⁾ If the plea goes to a part only of the action, the plaintiff may enter a *nolle pros.* or discontinuance as to such part ; but if he replies or demurs, and the defendant succeeds, the latter will be entitled to his costs thereof up to the time of pleading.⁽³⁾

(1) Rule Pl. 22, T. T. 1853, *ante*, p. 886.

(2) Rule Pl. 23, T. T. 1853. See *Plummer v. Hedge*, 24 L. J. 24, Q. B., where the defendant pleaded the plaintiff's insolvency, and the plaintiff confessed it, and the plea was allowed to be withdrawn.

(3) *Lyttleton v. Cross*, 4 B. & C. 117.

CHAPTER XXVI.

NUL TIEL RECORD.

1. In same court.

|

2. In another court.

1. *Pleading Judgment Recovered in same Court.*

WHEN the parties take issue on the existence of a certain record, such issue, unlike the ordinary cases of disputed facts, must be tried by the court and not by a jury. "Where a defendant shall plead a plea of judgment recovered,⁽¹⁾ he shall, in the margin of such plea, state the date of such judgment, and, if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and, in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea;⁽²⁾ and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the record or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea."⁽³⁾ A plea of *plene administravit* is not within this rule.⁽⁴⁾

⁽¹⁾ See a form of plea of judgment recovered in *Few v. Backhouse*, 8 A. & E. 790.

⁽²⁾ But the plaintiff may waive this omission in the margin, *Brokenshir v. Monger*, 9 M. & W. 111; 1 Dowl. N. S. 378.

⁽³⁾ Rule Pr. 10, H. T. 1853.

⁽⁴⁾ *Power v. Izod*, 3 Dowl. 140; 1 Bing. N. C. 304.

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Form of Plea of Judgment Recovered.

In the Q. B. ["C. P." or "Exch. of P."]

The day of , A.D.

D. } The defendant by D. A., his attorney, saith that the
 ats. } plaintiff, heretofore in Her Majesty's Court of⁽¹⁾ ,
 B. } impleaded the defendant in an action for the very same
 identical claim and cause of action in
 The judgment was signed the said declaration mentioned, and
 the day of , A.D. such proceedings were thereupon had,
 that the plaintiff afterwards, by the
 The number of the roll judgment of that court, recovered in
 is . that action against the defendant £ ,
 for the same identical claim and cause of action in the said declaration
 mentioned, which judgment remains in force.

"On a replication or other pleading denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, and instead thereof a four days' notice shall be substituted, requiring the defendant to produce the record, otherwise judgment."⁽²⁾

Form of Notice.

[Title of court and cause.]

Take notice, that you are required on the day of A.D. ,
 to produce the record pleaded by you herein, otherwise judgment will
 be entered for the plaintiff. Dated, &c.

Where the plaintiff replies *nul tiel record* to a plea of a record in the same court, or where he replies to a plea of *nul tiel record*, his replication concludes that the record may be inspected, and a day in court is named for the purpose.⁽³⁾

Form of Replication of Nul Tiel Record.

The plaintiff saith that there is not any record of the said recovery, [or as the case may be] in the said plea mentioned, remaining in the said court, as is in the said plea alleged, and because the said court

⁽¹⁾ See where the Common Pleas was held to be sufficiently described as "the Court of our Lady the Queen of Her Bench here at Westminster," *Bradley v. Gray*, 3 C. B. 726.

⁽²⁾ Rule Pr. 38, H. T. 1853.

⁽³⁾ See *Aylward v. Garrett*, 1 L. M. & P. 750.

here will advise themselves upon the inspection and examination of the record above alleged, a day is given to the parties aforesaid here until , to hear the judgment of the court thereupon, for that the court here are not yet advised thereof.

The issue is then made up and delivered as in other cases. It is entered on the roll and carried in.⁽¹⁾

When the plaintiff has to produce the record on the day in question, he must give notice in writing to the defendant's attorney that he will produce it; ⁽²⁾ and forty-eight hours' notice has been held sufficient.⁽³⁾

Form of Notice by Plaintiff.

[*Title of court and cause.*]

Take notice that the above-named plaintiff will on , in the Court of , at Westminster, produce to the said court the record of the recovery [or recognizance, &c.] in the declaration [or replication] in this cause mentioned. Dated, &c.

Trial.]—The trial is by the court upon the production of the record in question. The party, whose duty it is to produce it, applies to the proper officer previously for the record to be delivered to the Master of the court, and brought into court on the day appointed. Such party then instructs counsel to move for its production, which motion may be opposed by the other side. The Master then certifies to the court that the record is produced, and the court either gives judgment of failure of record or that the party hath perfected the record. If the record produced by the defendant in support of his plea be of a different date or roll, it seems he may apply for an amendment.⁽⁴⁾ A declaration on a judgment has, after a plea of *nul tiel record*, been allowed to be amended as to the date.⁽⁵⁾ The court has also allowed an amendment, where there was a variance between the declaration and the record as to the sum recovered.⁽⁶⁾

⁽¹⁾ See *Jackson v. Oates*, 5 D. & L. 231.

⁽²⁾ *Swinburn v. Taylor*, 9 M. & W. 43; *Hopkins v. Francis*, 2 D. & L. 664. This seems unnecessary in the C. P.: see Tidd, 743, (9th edit.)

⁽³⁾ *Hopkin v. Dagget*, 1 L. M. & P. 541; *Maguire v. Kincaid*, 7 Exch. 608.

⁽⁴⁾ See *Few v. Backhouse*, 8 A. & E. 789.

⁽⁵⁾ *Noble v. Chapman*, 14 C. B. 400.

⁽⁶⁾ *Hunter v. Emanuel*, 15 C. B. 290.

If the court will not amend the variance, the judgment must be one of failure of record.⁽¹⁾ Where the record pleaded has not been completed, this is no objection, and it may be completed after the plea of *nul tiel record*.⁽²⁾ Where a plea in abatement is pleaded of another action pending for the same cause, it is sufficient to produce the record of a writ;⁽³⁾ but an application has been made to the court, in which a *præcipe* only had been filed, to cancel the same.⁽⁴⁾

Where a defendant takes a preliminary objection during the trial, he is entitled to the reply as at *nisi prius*.⁽⁵⁾ The court will not allow the record to be impeached by affidavit;⁽⁶⁾ and the party producing the record is entitled to judgment, though there may be cancellations in it.⁽⁷⁾ So if the record show a reversal on error by consent.⁽⁸⁾

Judgment.]—Judgment for the defendant is final, if *nul tiel record* was the only issue. Judgment for the plaintiff is interlocutory or final, according to the nature of the action, as in the case of a demurrer.⁽⁹⁾ An *incipitur* on plain paper is taken to the proper officer who signs judgment; and if there be other issues to be tried by a jury, the jury will assess the damages on the interlocutory judgment.

Costs.]—The costs are the same as on trials by jury. When the action is brought on a judgment recovered by the plaintiff, and he succeeds on an issue of *nul tiel record*, it requires a special order of the court or a judge to give him the costs.⁽¹⁰⁾

2. Pleading Judgment of another Court.

When the judgment pleaded by the defendant has been recovered in another court, it must be proved at the trial

(1) See where it was held there was no variance, *Cocks v. Brewer*, 11 M. & W. 51; 2 Dowl. N. S. 759; *Phillips v. Smith*, 2 Dowl. N. S. 688; see where a judgment of a County Court was pleaded and nothing produced, but a minute saying the cause was struck out, *Tubby v. Stanhope*, 5 C. B. 790.

(2) *Cocks v. Brewer*, 11 M. & W. 51.

(3) *Nash v. Swinburne*, 4 Sc. N. R. 562.

(4) *Kerbey v. Siggers*, 4 M. & Sc. 481; 2 Dowl. 813.

(5) *Hodgson v. Chetwynd*, 3 D. & L. 45.

(6) *Cocks v. Brewer*, 11 M. & W. 51; 2 Dowl. N. S. 759.

(7) *Hopkins v. Francis*, 13 M. & W. 668; 2 D. & L. 664.

(8) *Bailey v. Turner*, 6 D. & L. 730.

(9) See *post*, "Demurrer."

(10) 43 Geo. 3, c. 46, s. 4; *ante*, p. 452.

by the production of a transcript or exemplification of the record, and this is obtained by a writ of *certiorari*, directed to the chief judge or officer having the custody of the writ.⁽¹⁾ If the court, in which the record is, be a superior court, the *certiorari* is sued out from the Petty Bag office directed to the chief of the court, returnable in Chancery; whereupon an exemplification or transcript of the record is written on parchment and sealed with the seal of the Chancellor, and sent with a *mittimus* to the court in which the action is. If, however, the action is in the Queen's Bench, and the record is in the Common Pleas or Exchequer, a *certiorari* may also issue direct from the Queen's Bench in the first instance.⁽²⁾ If the record is in an inferior court, the *certiorari* may be sued out either from the superior court in which the action is pending or out of the Petty Bag office. It is sufficient to return the tenor of the record without certifying the record itself.⁽³⁾

Form of Writ of Certiorari from Q. B. to C. P. or Exch.

VICTORIA, &c., to [the chief of the court] at Westminster, greeting: We being willing for certain causes to be certified of the proceedings in a plaint which was in our court before you and your companions, our justices of the bench [or you and others, the barons of our Exchequer] between A. B. and C. D., and of the judgment thereupon given in our said court as it is said, command you that* you send to us distinctly and openly, under your seal, a transcript of the proceedings and judgment aforesaid, with all things touching the same, together with this writ, so that we may have them before us at Westminster on . Witness , [chief justice] at Westminster, the day of , in the year of our Lord .

Form of Writ of Certiorari from a Superior Court to an Inferior Court.

[The writ being altered to suit the title of court down to.*] That having diligently searched and examined the rolls and other memorandums, and records of proceedings and judgments, in our said court, you distinctly and openly certify to us at Westminster, on , under your seal, the tenor of what you shall there find of the record and proceedings in the said plaint, and of the judgment aforesaid, &c.

(1) *Hewson v. Bunn*, 2 Burr. 1034.

(2) Tidd. 268.

(3) *Hambledon v. Lancashire* 3 Salk. 296; see as to Petty Bag Office, 11 & 12 Vict. c. 94; 12 & 13 Vict. c. 109.

CHAPTER XXVII.

DEMURRER.

- | | |
|-------------------------------------|--|
| 1. Demurrer generally. | 7. Issues in law and in fact. |
| 2. Pleading and demurring together. | 8. Demurrer book. |
| 3. Form of demurrer. | 9. Setting down demurrer and argument. |
| 4. Setting aside. | 10. Amendment. |
| 5. Withdrawing. | 11. Judgment. |
| 6. Joinder in demurrer. | 12. Costs. |

1. *Demurrer generally.*—A demurrer is a pleading which denies that a particular inference of law arises out of certain given facts; and accordingly it admits the facts from which the law is inferred.⁽¹⁾ “Either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and where issue is joined on such demurrer, the court shall proceed and give judgment according as the very right of the case and matter in law shall appear unto them, without regarding any imperfection, omission, defect in, or lack of form, and no judgment shall be arrested, stayed, or reversed for any such imperfection, omission, defect in, or lack of form.”⁽²⁾ “No pleading shall be deemed insufficient for any defect, which could heretofore only be objected to by *special demurrer*.”⁽³⁾ If a pleading, such as a plea, is clearly bad, and in violation of the rules of pleading,

(¹) Co. Litt. 71 b.; Lord Brougham defines a demurrer thus: “Be it so, what then?”

(²) C. L. P. Act, 1852, s. 50.

(³) *Ibid.* s. 51.

the opposite party is not bound to demur, but may apply to set the plea aside.⁽¹⁾

1. *Pleading and demurring together to the same matter.*]—“Either party may, by leave of the court or a judge, plead and demur to the same pleading at the same time, upon an affidavit by such party or his attorney, if required by the court or judge, to the effect, that he is advised and believes, that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid, by way of confession and avoidance, are respectively true in substance and in fact, and that he is further advised and believes, that the objections raised by such demurrer are good and valid objections in law, and it shall be in the discretion of the court or a judge to direct which issue shall be first disposed of.”⁽²⁾ It is entirely in the discretion of the judge to allow a party to plead and demur together, however unexceptionable the affidavit may be.⁽³⁾ An affidavit that the allegations of fact proposed to be traversed are untrue may be required, especially if the facts are within the party's own knowledge.⁽⁴⁾ An affidavit may be sufficient, which merely states that the party is “advised and believed” damage was caused, especially when law is mixed up with facts; as where, in an action for damage caused by the defendant's fraudulent representation, the latter pleaded “not guilty,” and a traverse of the fact that the plaintiff confided in such representation.⁽⁵⁾ Where, after leave to a party to plead and demur, judgment has been given against such party on the demurrer, the court will not strike out the order allowing him to traverse.⁽⁶⁾

2. *Form of demurrer.*]—“The form of a demurrer, except in cases herein specifically provided for, shall be as follows, or to the like effect:—

“The defendant, by his attorney [or in person, &c., or plaintiff], says that the declaration [or plea] is bad in substance.”

⁽¹⁾ *Robeson v. Ellis*, 5 D. & L. 403.

⁽²⁾ C. L. P. Act, 1832, s. 80.

⁽³⁾ *Thompson v. Knowles*, 11 Exch.

⁽⁴⁾ *Lumley v. Gye*, 2 E. & B. 216.

⁽⁵⁾ *Price v. Hewett*, 8 Exch. 146.

⁽⁶⁾ *Sheehy v. Professional Life Assurance Company*, 13 C. B. 787.

“ And in the *margin* thereof *some substantial matter of law* intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside by the court or a judge, and leave may be given to sign judgment as for want of a plea; and the form of a joinder in demurrer shall be as follows, or to a like effect :—

“ The plaintiff [or defendant] says that the declaration [or plea, &c.] is good in substance.”⁽¹⁾

The matter of law stated in the margin of the demurrer must be substantial, otherwise it may be set aside. One substantial ground only need be stated;⁽²⁾ and if several are stated, the party may rely on any of them.⁽³⁾ If the same objection applies to several pleas, it is enough to say that the subsequent plea is bad for the like causes and grounds stated in respect of the first plea.⁽⁴⁾

3. *Setting aside demurrer.*—If there is no marginal note, the court or judge will set it aside as above stated; so if the demurrer is frivolous.⁽⁵⁾ The application must be made before joining in demurrer.⁽⁶⁾ Where the application is made to the court, an affidavit is generally necessary, annexing a copy of the pleadings, or, if they are long, stating the substance of them.⁽⁷⁾ When a demurrer of the defendant's is set aside as frivolous, leave may be given to sign judgment on the whole record as for want of a plea, though there are other counts or replications unaffected by the demurrer.⁽⁸⁾

(1) C. L. P. Act, 1852, s. 89.

(2) *Ross v. Robeson*, 3 Dowl. 779; 1 Gale, 102.

(3) *Whitmore v. Nichols*, 5 Dowl. 521.

(4) *Braham v. Watkins*, 16 M. & W. 77.

(5) It is impossible to define what is a frivolous demurrer, but the motion to set aside demurrers on that ground has been made successfully in the following recent cases: *Nash v. Calder*, 5 C. B. 177; *Lomax v. Wilson*, 3 C. B. 763; *Wilcox v. Haswell*, 6 C. B. 72; *Heginbotham v. South Eastern Railway Company*, 8 C. B. 338; *Braithwaite v. Harrison*, 1 D. & L. 210; unsuccessfully in *Bather v. Brayne*, 7 C. B. 815; *White v. Woodward*, 4 C. B. 752; *Smith v. Whatley*, 1 D. & L. 196.

(6) *Norton v. Macintosh*, 7 Dowl. 529.

(7) *Hamer v. Anderton*, 9 Dowl. 119; *Daniels v. Lewis*, 1 Dowl. N. S. 542; *Lane v. Ridley*, 10 Q. B. 479.

(8) *Tucker v. Barnesley*, 16 M. & W. 54; 4 D. & L. 292.

4. *Withdrawing demurrer.*—The party demurring may, before argument, apply for leave of a judge to withdraw his demurrer, on payment of costs and other terms which the judge may think fit. When it is the defendant who applies, if he wants to be let in to plead, and has caused delay to the plaintiff, the judge may require an affidavit that the defendant has merits, and that his object in demurring was not delay.⁽¹⁾

5. *Joinder in demurrer.*—“The party demurring may give notice to the opposite party to join in demurrer in four days, which notice may be delivered separately, or indorsed on the demurrer, otherwise judgment.”⁽²⁾ A party cannot be compelled to join in demurrer before four days after the demand;⁽³⁾ and the party demurring cannot add the joinder in demurrer for his opponent;⁽⁴⁾ nor can a judge give leave to add it, unless the opponent has been applying for time or some other favour.⁽⁵⁾ Where a rule *nisi*, with a stay of proceedings, had been obtained after the time of joining had expired, and was discharged, it was held the party had the whole of that day to join in demurrer.⁽⁶⁾ Where the defendant, after a demurrer of the plaintiff, gives notice that he will proceed no further with the plea demurred to, there being an issue joined on another plea, the plaintiff cannot sign judgment on the whole record, but should apply to strike out the plea.⁽⁷⁾

The joinder in demurrer is engrossed and delivered to the opposite attorney, and when the defendant demurs, the plaintiff may add it in making up the demurrer book, instead of delivering it separately. “In all cases where the defendant demurs to the plaintiff’s declaration, replication, or other subsequent pleading, the defendant’s attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a

⁽¹⁾ *Wilson v. Tucker*, 2 Dowl. 83; *Underhill v. Harvey*, 3 Dowl. 496; *Cooper v. Hawkes*, 1 C. & J. 219.

⁽²⁾ Rule Pr. 14, H. T. 1853.

⁽³⁾ *Hall v. Popplewell*, 5 M. & W. 341.

⁽⁴⁾ *Billing v. Knightly*, 5 Bing. N. C. 629; 7 Dowl. 660; 7 Sc. 844.

⁽⁵⁾ *Cook v. Blake*, 4 D. & L. 313.

⁽⁶⁾ *Vernon v. Hodgins*, 4 Dowl. 654.

⁽⁷⁾ *Hitchcock v. Walter*, 6 Dowl. 457; 5 Sc. 792; *Macintyre v. Miller*, 13 M. & W. 725.

plea in bar, or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of executing a writ of inquiry on the back of such demurrer."⁽¹⁾

6. *Issues in law and in fact.*—Where there are issues in law and in fact, the plaintiff has the option to try either first, subject to the control of the court.⁽²⁾ Where the party has leave to demur and plead to the same pleading, the court has the same discretion as to ordering either issue to be tried first.⁽³⁾ But the court has no power to stay the trial of the issue of fact till a court of error has disposed of the issue in law.⁽⁴⁾ In general the court will order the demurrer to be argued first, as thereby the trial may be unnecessary, and the pleading may not be allowed to be amended after verdict.⁽⁵⁾ So where the point of law may be the foundation of the right to damages.⁽⁶⁾ But if the issues in fact are not connected with those of law, the court will generally refuse to interfere.⁽⁷⁾ Where the defendant obtained judgment upon demurrers to two pleas, each going to the whole cause of action, and there remained issues of fact untried, the court refused to compel the defendant to enter a general judgment of *nil capiat per breve*, in order that the plaintiff might bring error without going down to trial upon the issues in fact.⁽⁸⁾ If the issues in fact are tried first, and the plaintiff is nonsuited, contingent damages cannot be assessed on the demurrer.⁽⁹⁾ When the trial takes place first, the issue is made up as usual, containing the whole pleadings, and the jury are directed to come as well to try the issues in fact as to assess contingent damages on the issue in law, if the latter should be found for the plaintiff.⁽¹⁰⁾ When the demurrer is first determined, the judgment is generally entered on the issue.

⁽¹⁾ Rule Pr. 40; H. T. 1853.

⁽²⁾ *Roberts v. Tayler*, 7 M. & Gr. 659; 8 Sc. N. R. 399; *Bird v. Higginson*, 5 A. & E. 83.

⁽³⁾ C. L. P. Act, 1852, s. 80; *ante*, p. 897.

⁽⁴⁾ *Lumley v. Gye*, 2 E. & B. 216.

⁽⁵⁾ *Crucknell v. Trueman*, 9 M. & W. 684; 2 Dowl. N. S. 276.

⁽⁶⁾ *Burdell v. Coleman*, 18 East, 27.

⁽⁷⁾ *Roberts v. Tayler*, 7 M. & Gr. 659; 8 Sc. N. R. 399.

⁽⁸⁾ *Hinton v. Acraman*, 3 C. B. 737; 4 D. & L. 462.

⁽⁹⁾ *Snow v. Como*, 1 Str. 507.

⁽¹⁰⁾ *Poole v. Grantham*, 8 Sc. N. R. 722; *Wood v. Peyton*, 13 M. & W. 371.

7. *Demurrer books.*]—What the issue is when questions of fact arise between the parties, the demurrer book is when questions of law arise, and contains copies of the pleadings down to the joinder in demurrer. “When,” however, “there shall be a demurrer to part only of the declaration or other subsequent pleadings, those parts only of the declarations and pleadings to which such demurrer relates shall be copied into the demurrer books ; and if any other parts shall be copied, the Master shall not allow the costs thereof on taxation either as between party and party, or as between attorney and client.”⁽¹⁾ But if the plea demurred to is explained by another plea, the latter should be inserted.⁽²⁾

“Four clear days before the day appointed for argument, the plaintiff shall *deliver copies of the demurrer book*, special case, special verdict, or appeal cases, with the points intended to be insisted on, to the Lord Chief Justice of the Queen’s Bench or Common Pleas, or Lord Chief Baron, as the case may be, and the senior *puise* judge of the court in which the action is brought, and the defendant shall deliver copies to the other two judges of the court next in seniority, and in default thereof by either party, the other party may, on the day following, deliver such copies as ought to have been so delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the Master a sufficient sum to pay for such copies. If the statements of the points have not been exchanged between the parties, each party shall, in addition to the two copies left by him, deliver also his statement of the points to the other two judges, either by marking the same in the margin of the books delivered or on separate books.”⁽³⁾ One party cannot make the other pay the costs of copies delivered, unless he has himself strictly complied with the rule.⁽⁴⁾ If all the demurrer books are not delivered by one or other of the parties, the case is struck out of the paper.⁽⁵⁾ If the parties do not exchange the points for argument, each may obtain the other’s points by applying to the judge’s clerk.⁽⁶⁾ If each

⁽¹⁾ Rule Pr. 17, H. T. 1853.

⁽²⁾ *Burroughs v. Hodson*, 9 A. & E. 499 ; 1 P. & D. 328 ; *Hooper v. Woolmer*, 10 C. B. 370 ; 1 L. M. & P. 634.

⁽³⁾ Rule Pr. 16, H. T. 1853.

⁽⁴⁾ *Hooper v. Woolmer*, 10 C. B. 370.

⁽⁵⁾ *Abraham v. Cook*, 3 Dowl. 215.

⁽⁶⁾ *Scott v. Chappelon*, 2 Dowl. N. S. 78 ; 4 M. & Gr. 336.

party object to the other's pleadings, each must deliver paper books with his points marked.⁽¹⁾ The points should be specific.⁽²⁾ The court may itself take a point not marked by the party,⁽³⁾ or may postpone the case in order that the point may be marked.⁽⁴⁾

8. *Setting down, and argument.*]—"No motion or rule for a concilium shall be required; but demurrers, as well as all special cases, special verdicts, and appeals from county courts, shall be set down for argument in the special paper, at the request of either party, four clear days before the day on which the same are to be argued, and notice thereof shall be given forthwith by such party to the opposite party."⁽⁵⁾ This notice should be given in time to allow the other party to prepare his demurrer books,⁽⁶⁾ but cannot be given before or on the same day with the joinder in demurrer.⁽⁷⁾ If a demurrer is resorted to for gaining time, the court may set down the case sooner for argument.⁽⁸⁾

Form of Notice of Setting Down for Argument.

[*Title of court and cause.*]

Take notice, that the demurrer to be argued in this case was this day set down for argument, on the day of instant.

D. A., &c.

P. A., &c.

The causes are entered in the paper and taken in their order on paper days, which, generally, do not occur during the first or last four days of term, unless other business is deficient. The counsel for the party demurring begins. Where there are cross demurrers, it seems the plaintiff is entitled to begin.⁽⁹⁾ One counsel only of a side is heard, and if defendants appear severally, but their pleas are sub-

(1) *Clarke v. Davies*, 7 Taunt. 72; *Arbouin v. Anderson*, 1 Q. B. 498; *Parker v. Riley*, 3 M. & W. 230; see *Gatcliffe v. Bourne*, 5 Sc. 674, where a party who had neglected this was confined to answering his opponent's points.

(2) *Ibid.*; see *Grottick v. Phillips*, 3 M. & Sc. 138; 9 Bing. 723.

(3) *Arbouin v. Anderson*, 1 Q. B. 498.

(4) See *Coleby v. Graves*, 3 M. & W. 235, cited.

(5) Rule Pr. 15, H. T. 1853.

(6) *Britten v. Britten*, 2 Dowl. 239.

(7) *Gibbons v. Mottram*, 1 D. & L. 815; 7 Sc. N. R. 535.

(8) *Wilson v. Tucker*, 2 Dowl. 83.

(9) *Williams v. Jarman*, 2 D. & L. 212; 13 M. & W. 128; *Bourne v. Seymour*, 16 C. B. 337. This is now settled: *Parker v. Midland Railway Company*, 18 C. B. 53.

stantially the same, one counsel only will be heard for all.⁽¹⁾ Where the court is equally divided, and the parties desire to bring error, one of the judges will withdraw his opinion.⁽²⁾

9. Amendment before and after Argument.

In general, the party whose pleading is demurred to may, before argument, obtain leave to amend, on payment of costs, and sometimes even without payment of costs.⁽³⁾ If, at the commencement of the argument, the party accepts the suggestion of the court to amend, he is generally allowed to do so on payment of costs; but after the judges have given their opinions, leave is generally refused.⁽⁴⁾ If the court has heard the argument, and taken time to consider, the party may sometimes obtain leave, before judgment is delivered, to amend;⁽⁵⁾ so, where the party's counsel was not present at the judgment, he has been allowed even afterwards to amend.⁽⁶⁾ But where it is the defendant who, after argument, has leave to amend, the court may require an affidavit showing a good defence on the merits,⁽⁷⁾ and amendment has been refused altogether where the plaintiff has lost a trial.⁽⁸⁾ Leave to amend has, moreover, been refused to a plaintiff in *qui tam* actions,⁽⁹⁾ in an action against bail⁽¹⁰⁾ in a hard action,⁽¹¹⁾ where it is a second demurrer to the same pleading.⁽¹²⁾ The court has allowed the plaintiff, whose replication was demurred to, to amend and demur to the plea.⁽¹³⁾ Where leave is given to a party whose pleading is demurred to, to amend on "the usual terms," the

(1) *Wilson v. Carey*, 10 M. & W. 641; 2 Dowl. N. S. 531.

(2) *Mayor of Norwich v. Norfolk Railway Company*, 4 E. & B. 397.

(3) *Tomlinson v. Bollard*, 4 Q. B. 642; *Collins v. Aaron*, 4 Bing. N. C. 233; 6 Dowl. 423; *Solomons v. Lyons*, 1 East, 370.

(4) *Skuse v. Davis*, 10 A. & E. 635; 7 Dowl. 774; *Weld v. Baxter*, 27 L. T. 190, Exch.

(5) *Heydon v. Thompson*, 1 A. & E. 210.

(6) *Hayward v. Bennett*, 5 C. B. 593.

(7) *Bramah v. Roberts*, 1 Bing. N. C. 481; 1 Sc. 364; *Gibbons v. Mottram*, 7 Sc. N. B. 543; *Morant v. Sign*, 2 M. & W. 95.

(8) *Jordan v. Twells*, Hardr. 171.

(9) *Wood v. Grimwood*, 10 B. & C. 689.

(10) *Saxby v. Kirkus*, Say. 117.

(11) *Noble v. King*, 1 H. Bl. 37; 1 Sellon, 275.

(12) *Kinder v. Paris*, 2 H. Bl. 561.

(13) *Wheeler v. Senter*, 7 M. & W. 562.

opposite party is entitled to withdraw his demurrer and plead afresh, at the expense of the party amending.⁽¹⁾ When leave to amend is given on payment of costs, such payment is a condition precedent.⁽²⁾

10. Judgment.

The plaintiff may be nonsuited on the demurrer.⁽³⁾ The court gives judgment according as the very right of the cause and matter in law shall appear to them, regardless of any defect in form.⁽⁴⁾ A judgment for the plaintiff is interlocutory or final in the same circumstances as a judgment by default.⁽⁵⁾ If the judgment on a single issue be for the defendant, it is a final judgment of *nil capiat per breve*, and if there are several pleas going to the whole cause of action, and the defendant has judgment on one, he may apply to the court to strike out the others on payment of costs. If there are issues of fact and law raised on the pleas, and the defendant succeed on any of the demurrers, and the plea goes to the whole cause of action, the plaintiff cannot have judgment on any issue of fact found for him;⁽⁶⁾ but the judgment must be *nil capiat per breve*.⁽⁷⁾ The court has allowed issues of fact, with consent of the party succeeding on the demurrer, to be struck out, so that error may be brought, with liberty to replace the issues.⁽⁸⁾ Where there are issues of fact and law, and the plaintiff has obtained judgment on the demurrer, this judgment is interlocutory, and the damages may be assessed on it at the trial,⁽⁹⁾ or, if the issue in fact is distinct from that in law, he may enter a *nolle prosequi* as to the issues in fact, and sue out a writ of inquiry or reference as to the demurrer;⁽¹⁰⁾ or he may discontinue, and he will still be entitled to his costs of the demurrer.⁽¹¹⁾

(1) *Metcalf v. Booth*, 7 D. & L. 15.

(2) *Levy v. Drew*, 5 D. & L. 307.

(3) *Nesbit v. Rishton*, 10 A. & E. 246.

(4) C. L. P. Act, 1852, s. 50, *ante*, p. 896. See where a demurrer is too large, *Slade v. Hawley*, 13 M. & W. 757.

(5) See *post*, "Judgment by Default."

(6) *Young v. Beck*, 3 Dowl. 804.

(7) *Hinton v. Acraman*, 3 C. B. 737.

(8) *Beckham v. Knight*, 7 Sc. 346; 7 Dowl. 400; *Carden v. General Cemetery Company*, 7 Sc. 348; 7 Dowl. 425.

(9) *Gregory v. Duke of Brunswick*, 6 M. & Gr. 953.

(10) 1 Saund. 109 n. (1); *Anon.* 1 Salk. 210.

(11) *Mayor of Macclesfield v. Gee*, 13 M. & W. 470; 2 D. & L. 418. He must discontinue the whole action and not merely the plea demurred to, *Benton v. Polkinghorne*, 16 M. & W. 8.

After argument, and the opinions of the judges are delivered, obtain from the Master a peremptory rule that judgment be entered for the plaintiff or defendant, and serve a copy on the opposite attorney. An *incipitur* of the declaration is then made and taken with the rule, and the judgment will be stamped and costs taxed. If the judgment is interlocutory, a writ of inquiry or reference to the Master must be sued out as stated *post*, under those heads.

11. Costs.

“Where judgment shall be given, either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf.”⁽¹⁾ This right of the party succeeding on the demurrer is wholly independent of what may become of the issues of fact in the action, and the plaintiff is entitled to those costs, though he discontinue,⁽²⁾ or recovers less than forty shillings at the trial, and obtains no certificate for costs,⁽³⁾ or withdraws a juror,⁽⁴⁾ or wholly fails.⁽⁵⁾ And it seems the costs of the demurrer may be taxed and judgment signed before the trial of the issues in fact.⁽⁶⁾

⁽¹⁾ 3 & 4 Will. 4, c. 42, s. 34.

⁽²⁾ *Mayor of Macclesfield v. Gee*, 13 M. & W. 470; *Ellwood v. Bullock*, 6 Q. B. 383.

⁽³⁾ *Taylor v. Rolfe*, 5 Q. B. 337; 1 D. & M. 229; *Poole v. Grant-ham*, 8 Sc. N. B. 722.

⁽⁴⁾ *Bentley v. Dawes*, 10 Exch. 347.

⁽⁵⁾ *Gregory v. Duke of Brunswick*, 3 C. B. 481.

⁽⁶⁾ *Ibid.*; *Bentley v. Dawes*, 10 Exch. 347.

CHAPTER XXVIII.

SPECIAL CASE.⁽¹⁾

It frequently happens that at the trial of issues of fact the parties find that the matters in dispute would be better decided by the court, and they agree to take a general verdict, subject to a special case, which is afterwards drawn up by counsel and argued before the court *in banc*.⁽²⁾ The court will not allow a special case to be amended, by raising a point which the parties have not raised for their consideration.⁽³⁾ The parties may also agree upon a special case without going to trial at all, provided there is no dispute as to points of fact. Power was given for this purpose by 3 & 4 Will 4, c. 42, s. 25 ; but that statute required the usual pleadings to have been proceeded with up to issue joined. Now no pleadings whatever are necessary, for "the parties may, after writ issued, and before judgment, by consent and order of a judge, state any question or questions of law in a special case for the opinion of the court without any pleadings."⁽⁴⁾ The parties must, however, have a *bonâ fide* interest in the question of law.⁽⁵⁾ Moreover, something must be claimed for which an action at law could be maintained by the one party against the other ; thus, the court refused to hear a case, "whether a lord of a manor

(1) See also *post*, "Arbitration."

(2) See as to this *ante*, p. 358 ; see also *post*, "Arbitration."

(3) *Hills v. Hunt*, 15 C. B. 1.

(4) C. L. P. Act, 1852, s. 46.

(5) *Doe v. Duntze*, 6 C. B. 100.

was entitled to a treble fine on admittance," because the lord was not entitled to sue for a fine before admittance, and he had not admitted.⁽¹⁾

Consent of the parties as to costs, &c.—Before applying for the judge's order, the parties should agree on the terms and the consequences to result from the judgment of the court. "The parties may, if they think fit, enter into an agreement in writing, which shall not be subject to any stamp duty, and which shall be embodied in the said or any subsequent (judge's) order, that upon the judgment of the court being given in the affirmative or negative of the question or questions of law raised by such special case, a sum of money fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, shall be paid by one of such parties to the other of them, either with or without costs of the action, and the judgment of the court may be entered for such sum as shall be so agreed or ascertained, with or without costs, as the case may be, and execution may issue upon such judgment forthwith, unless otherwise agreed or unless stayed by proceedings in error."⁽²⁾ The entry of the judgment is for the purpose of enabling the successful party to issue execution, or the unsuccessful party to bring error.⁽³⁾

"In case no agreement shall be entered into as to the costs of such action, the costs shall follow the event, and be recovered by the successful party."⁽⁴⁾

The agreement, as to the costs and result of the judgment, and whether error is to be brought, should be in the first instance settled between the parties, which may be in a form similar to that given *ante*, p. 441. The proposed plaintiff then issues the writ, and makes an affidavit,⁽⁵⁾ and applies for a summons at the judge's chambers, which is served on the opposite attorney, who will indorse his consent to the order. The order is then served. The special case is signed by counsel or the party himself.⁽⁶⁾

⁽¹⁾ *Lord Wellesley v. Withers*, 4 E. & B. 750.

⁽²⁾ C. L. P. Act, 1852, s. 47.

⁽³⁾ *Hughes v. Lumley*, 4 E. & B. 274, 358; *Elliott v. Bishop*, 11 Exch. 321.

⁽⁴⁾ C. L. P. Act, 1852, s. 48.

⁽⁵⁾ See *ante*, p. 440.

⁽⁶⁾ *Blanchardiere v. Elvery*, 18 L. J. 381, Exch.; *Price v. Quarrel*, 12 A. & E. 784; *Udney v. East India Company*, 13 C. B. 742; *ante*, p. 358.

The special case, when settled, may be set down for argument in the special paper, at the request of either party, four clear days before the day on which it is to be argued, and notice thereof must be given forthwith to the opposite party. It is argued like a demurrer.⁽¹⁾

Error may be brought upon the judgment, unless the parties have agreed to the contrary, and the court of error may give what judgment the court below ought to have given.⁽²⁾ In a case where a plaintiff claimed two sums in the court below, and he was there held entitled to one sum only, but the court of error held he was entitled to both, the plaintiff was held entitled to costs in respect of the sum on which he failed in the court below.⁽³⁾

Form of Special Case without Pleadings.

In the Q. B. ["C. P." or "Exch. of Pleas."]

Between A. B., plaintiff,
and
C. D. defendant.

This is an action brought by the plaintiff against the defendant for the recovery of £ , [state the object of the action shortly] and by the consent of the parties, and by the order of the Hon. Justice , dated , pursuant to the Common Law Procedure Act, 1852, the following case has been stated for the opinion of the court, without any pleadings. [State the case.]

The questions for the opinion of the court are first, whether, &c.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for the plaintiff for £ , and costs of suit.

If the court shall be of opinion in the negative, then, &c.

Form of Judgment for the Plaintiff on a Special Case when no agreement between the parties as to the sum to be paid beyond the agreement contained in the case itself.⁽⁴⁾

[Copy the special case, and then proceed thus :]—Afterwards on come the parties aforesaid, by their respective attorneys aforesaid, and the court is of opinion that [&c., state the opinion of the court on the question or questions stated in the case.]⁽⁵⁾ Therefore it is

(1) Rule Pr. 15, H. T. 1853 ; see *ante*, p. 902.

(2) C. L. P. Act, 1854, s. 32.

(3) *Elliott v. Bishop*, 11 Exch. 321.

(4) Rule Pr. M. V. 1854, sched.

(5) If an agreement was entered into between the parties, here insert a recital of such agreement.

considered that the plaintiff do recover against the defendant the said £ , and £ for his costs of suit.

[In the margin opposite the words "Therefore it is considered," &c., write, "Judgment signed the day of , 18 , inserting the day of signing final judgment."]

Form of Judgment of Affirmance and Reversal by the Court of Error in Exchequer Chamber on a Special Case.

These forms are given *ante*, p. 536.

CHAPTER XXIX.

PAYMENT INTO COURT.

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| 1. In what cases. | 6. Replication and subsequent proceedings. |
| 2. How paid in. | 7. Costs. |
| 3. When. | 8. Plea of tender. |
| 4. Form of plea. | |
| 5. Effect of plea as an admission. | |

 1. *In what cases.*

VARIOUS statutes enable defendants to pay money into court by way of compensation or amends. By the Common Law Procedure Act, 1852, s. 70, "it shall be lawful for the defendant in all actions (except actions for assault and battery,⁽¹⁾ false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation or debauching of the plaintiff's daughter or servant), and by leave of the court or a judge, upon such terms as they or he may think fit for one or more of several defendants, to pay into a court a sum of money by way of compensation or amends, provided nothing herein contained shall be taken to affect 6 & 7 Vict. c. 96, an act to amend the law as to defamatory words and libel." In actions against justices of the peace for acts done officially, the defendant may pay into court.⁽²⁾ In actions on bonds

⁽¹⁾ i. e. an assault on the plaintiff, but not on the plaintiff's son, *Newton v. Holford*, 6 Q. B. 921; 2 D. & L. 564.

⁽²⁾ 11 & 12 Vict. c. 44, s. 11; *ante*, p. 709.

with a penalty, the defendant may, with leave, pay into court under 4 & 5 Anne, c. 16, s. 13, and the action will be stayed.⁽¹⁾ In actions by a bankrupt's assignees to recover money due to the estate before the time for disputing the bankruptcy has elapsed, the defendant may pay into court.⁽²⁾ So in actions for *libel* in a newspaper or periodical, the defendant may pay into court.⁽³⁾ Where the money is paid in and pleaded, when it is incompetent to do so, the plaintiff may demur to the plea; or if the defect is *ex facie*, he may move for judgment *non obstante veredicto* or a repleader.⁽⁴⁾ The defendant, however, is not bound in those actions, to which payment into court is inapplicable except under peculiar circumstances or under a certain character, to set forth in his plea such character or circumstances.⁽⁵⁾ Where there are several counts in the declaration for several causes of action, the defendant may pay one entire sum into court in satisfaction of the whole,⁽⁶⁾ without confining his plea to any particular count; ⁽⁷⁾ or he may pay money in upon one of the counts.⁽⁸⁾ But the court has refused to allow a sum to be paid in as to part of the damages for breach of a special contract.⁽⁹⁾

2. *How paid in.*

"No rule or judge's order to pay money into court shall be necessary, except in the case of one or more of several defendants; but, the money shall be paid to the proper officer of each court, who shall give a receipt for the amount in the margin of the plea, and the said sum shall be paid out to the plaintiff or to his attorney upon a written authority from the plaintiff on demand."⁽¹⁰⁾ Where

⁽¹⁾ *England v. Watson*, 9 M. & W. 333; 1 Dowl. N. S. 668; *Bishop of London v. M'Neil*, 9 Exch. 490.

⁽²⁾ 12 & 13 Vict. c. 106, s. 158; *ante*, p. 674.

⁽³⁾ 6 & 7 Vict. c. 96, s. 2.

⁽⁴⁾ *Aston v. Parkes*, 15 M. & W. 385; 3 D. & L. 655; *Key v. Thimbleby*, 6 Exch. 692; see *Thompson v. Sheppard*, 4 E. & B. 53.

⁽⁵⁾ *Ibid.*; *Thompson v. Sheppard*, 4 E. & B. 53.

⁽⁶⁾ *Marshall v. Whiteside*, 1 M. & W. 188; 4 Dowl. 766.

⁽⁷⁾ *Mitchell v. Towneley*, 7 A. & E. 164.

⁽⁸⁾ *Baillie v. Cazelet*, 4 T. R. 579; so in *replevin* for goods taken in different places, he may pay money as to the goods in one place, and *avow* as to those in another, *Lambert v. Hepworth*, 2 Q. B. 729; 2 G. & D. 112.

⁽⁹⁾ *Hodges v. Litchfield*, 3 M. & Sc. 201; 2 Dowl. 741.

⁽¹⁰⁾ C. L. P. Act, 1852, s. 72.

two separate actions had been brought against two joint contractors, and one had paid money into court, the other was allowed to enter on the record a plea of payment without actually paying the same.⁽¹⁾ But the court has refused to allow money paid into court in lieu of special bail to be deemed as paid into court on a plea of payment.⁽²⁾ If too little money has been paid in, from not allowing interest or damages up to the time of payment, &c., the defendant should apply for leave to amend his plea.⁽³⁾ One of several defendants paying in is generally made to pay the costs against all the defendants, if the money is taken out in satisfaction.⁽⁴⁾ It is usual to plead the plea on payment into court as the last plea.

3. *When paid in.*

The plea of payment into court must be pleaded within the same time as a plea in bar. Where, however, another plea has been pleaded, the defendant may apply to a judge for leave to withdraw it, and to pay money into court ;⁽⁵⁾ and it has been allowed even after a verdict or writ of inquiry was set aside.⁽⁶⁾

4. *Form of Plea.*

The following is given as the form of plea in the Common Law Procedure Act, 1852, s. 71 :

The defendant, by _____, his attorney, [*or, in person, &c.*] [*if pleaded to part say, as to £ _____, parcel of the money claimed*], brings into court the sum of £ _____, and says that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.

The full amount, admitted by the plea to be due, must be paid into court,⁽⁷⁾ or a special defence shown as to the

(1) *Rendall v. Malleson*, 16 M. & W. 829.

(2) *Balls v. Stafford*, 4 Dowl. 327 ; 2 Sc. 426.

(3) See *Cook v. Hopewell*, 11 Exch. 555, *ante*, p. 886, where, the costs not being included, the plaintiff was entitled to go on with the action.

(4) *Hay v. Panchiman*, 2 W. Bl. 1029.

(5) *Griffiths v. Williams*, 1 T. R. 710 ; *Tarlton v. Wragg*, 2 Str. 1271.

(6) *Day v. Edwards*, 1 Taunt. 491 ; Tidd, 672.

(7) *Tattersall v. Parkinson*, 16 M. & W. 752 ; *Grimsley v. Parker*, 3 Exch. 610.

residue.⁽¹⁾ But it is not necessary to state how much is applicable to each several count,⁽²⁾ though it is better to connect the counts where they are for the same sum, by pleading to both that it is the same sum, and paying into court such sum.⁽³⁾ If the action is one, as to which payment into court is *prima facie* inapplicable, it seems unnecessary to state in the plea the particular character or circumstances under which the defendant became entitled to pay in money, and the above form is applicable in all cases; and where the defendant usurps the privilege of paying into court when not entitled to do so, the plaintiff's remedy is by an application to the court or a judge.⁽⁴⁾

5. *Effect of Plea as an Admission, &c.*

As regards the common *indebitatus* counts, a payment into court admits that the money is due under some contract declared upon, but does not necessarily admit any particular contract, and it lies on the plaintiff to show which, if he claims a larger amount.⁽⁵⁾ And where the *indebitatus* counts are joined with special counts, payment into court on the former does not admit allegations in the latter.⁽⁶⁾ So, where a declaration in tort is general, payment merely admits a cause of action, but not the cause sued for.⁽⁷⁾ Where, however, money is paid in on a special declaration, or on a special count, setting forth a contract, the payment admits the contract as declared on.⁽⁸⁾ It does not admit the plaintiff's right of action beyond the sum paid into court;⁽⁹⁾ and the defendant may plead a defence to other parts of the claim if it is

(1) *Armfield v. Burgin*, 6 M. & W. 281; 8 Dowl. 247. See *Hills v. Mesnard*, 10 Q. B. 266; *Bailey v. Sweeting*, 12 M. & W. 616; 1 D. & L. 663.

(2) *Marshall v. Whiteside*, 1 M. & W. 188; *Beesley v. Dolley*, 8 Sc. 243; *Noel v. Davies*, 4 M. & W. 136. See also *Brune v. Thompson*, 4 Q. B. 543.

(3) *Tattersall v. Parkinson*, 16 M. & W. 752.

(4) *Thompson v. Shepherd*, 4 E. & B. 53.

(5) *Kingham v. Robins*, 5 M. & W. 94; *Robinson v. Ward*, 8 Q. B. 920; 7 Dowl. 352; *Schreger v. Carden*, 11 C. B. 851; *Goff v. Harris*, 5 M. & Gr. 573.

(6) *Charles v. Branker*, 12 M. & W. 743; 1 D. & L. 989; *Gould v. Oliver*, 2 Sc. & R. 242; 2 M. & Gr. 208.

(7) *Perren v. Monmouthshire Railway Company*, 11 C. B. 855; *Tancred v. Leyland*, 16 Q. B. 669; *Story v. Finnis*, 6 Exch. 123.

(8) *Perren v. Monmouthshire Railway Company*, 11 C. B. 855; *Archer v. English*, 2 Sc. N. R. 156; 9 Dowl. 11; *Robinson v. Harman*, 1 Exch. 850; *Wright v. Goddard*, 8 A. & E. 144.

(9) *Stapleton v. Nowell*, 6 M. & W. 9; 8 Dowl. 196.

divisible,⁽¹⁾ or dispute any item of the particulars beyond the amount paid.⁽²⁾

6. *Replication and Subsequent Proceeding.*

"The plaintiff, after the delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in, and he shall be at liberty, in that case, to tax his costs of suit, and in case of nonpayment thereof, within forty-eight hours, to sign judgment for his costs of suit so taxed;⁽³⁾ or the plaintiff may reply, that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded, and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit."⁽⁴⁾ When the money is once paid in, the defendant, it seems, can never become entitled to it, but it belongs to the plaintiff or his executors, whatever be the result of the action.⁽⁵⁾ If, however, the defendant has paid in money, and pleaded by mistake, or if the plaintiff has taken it out by mistake, either may apply to the court for leave to withdraw the pleading, or amend.⁽⁶⁾ The sum is paid out to the plaintiff or his attorney, on demand, on a written authority from the plaintiff.⁽⁷⁾ And "no affidavit shall be necessary to verify the plaintiff's signature to the written authority to his attorney to take money out of court, unless specially required by the Master."⁽⁸⁾ The taking of the money out of court waives any irregularity in paying it in.⁽⁹⁾ If the plaintiff takes out the money in full satisfaction

⁽¹⁾ *Reid v. Dickens*, 5 B. & Ad. 499.

⁽²⁾ *Stevenson v. Mayor of Berwick*, 1 Q. B. 164; *Booth v. Howard*, 5 Dowl. 438; *Goff v. Harris*, 5 M. & Gr. 573.

⁽³⁾ The form may be thus: "And the plaintiff's costs of suit were afterwards taxed at £ , and, although forty-eight hours after such taxation have elapsed, yet the said £ , or any part thereof, hath not been paid to the plaintiff. Therefore it is considered that the plaintiff recover against the defendant the said £ , for his said costs."

⁽⁴⁾ C. L. P. Act, 1852, s. 73.

⁽⁵⁾ *Malcolm v. Fullarton*, 2 T. R. 648; *Elliot v. Callow*, 2 Salk. 597; *Vaughan v. Barnes*, 2 B. & P. 392.

⁽⁶⁾ *Emery v. Webster*, 9 Exch. 242.

⁽⁷⁾ C. L. P. Act, 1852, s. 72, *ante*.

⁽⁸⁾ Rule Pr. 11, H. T. 1853.

⁽⁹⁾ *Griffith v. Williams*, 1 T. R. 710.

of the cause of action in respect of which it was paid in, and there are other pleas upon which he does not intend to proceed, he should reply the acceptance and enter a *nolle prosequi* as to the latter pleas, in which case he will be entitled to the general costs of the action, but must pay the costs of the *nolle prosequi*.⁽¹⁾ Where the money is taken out, but not in full satisfaction, the plaintiff must reply within the usual time,⁽²⁾ and go to trial on that and the other issues, and cannot at once tax his costs in respect of the cause of action as to which the money is paid in.⁽³⁾ The defendant cannot use the payment into court as evidence on the trial of the issues joined.⁽⁴⁾ Where a party is sued for breach of an agreement to grant a lease, having had no title, and pays money into court, he cannot, under the plea of payment into court, give evidence that the plaintiff was aware of the defect of title.⁽⁵⁾ The plaintiff may be non-suit after payment of money into court.⁽⁶⁾

Form of Replication.

The plaintiff accepts the said £ in full satisfaction and discharge of the causes of action in the declaration mentioned.

Ditto.

The plaintiff says that the said sum so brought into court by the defendant is not enough to satisfy the claim of the plaintiff.

7. *Costs.*

When the plaintiff replies by accepting the sum paid in as satisfaction, he is entitled to his costs of suit⁽⁷⁾ on that plea, whatever becomes of the other issues in the cause.⁽⁸⁾ So he is entitled to the general costs of the cause, when the defendant pays in money on a new assignment and it is accepted.⁽⁹⁾ Under special circumstances, the defendant will be allowed to pay in money without being liable, up to the time of

⁽¹⁾ See *Emmott v. Standen*, 3 M. & W. 497; 6 Dowl. 591; *Topham v. Kidmore*, 5 Dowl. 676.

⁽²⁾ *Ibid.*

⁽³⁾ *Cauty v. Gyll*, 5 Sc. N. R. 819.

⁽⁴⁾ *Gould v. Oliver*, 2 Sc. N. R. 241.

⁽⁵⁾ *Robinson v. Harman*, 1 Exch. 850.

⁽⁶⁾ *Gutteridge v. Smith*, 2 H. Bl. 374.

⁽⁷⁾ C. L. P. Act, 1852. s. 73, *ante*, p. 914.

⁽⁸⁾ *Rumbelow v. Whalley*, 16 Q. B. 397.

⁽⁹⁾ *Benn v. Bateman*, 8 M. & W. 666.

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paying in ; thus, where he tendered the money after action brought, he was made to pay costs only up to the tender.⁽¹⁾ Where, however, the plaintiff enters a *nolle prosequi* as to part of the cause of action, he is liable to pay the defendant's costs in respect thereof;⁽²⁾ and if he does not enter a *nolle pros.* when he intends to proceed no further, the defendant is entitled to sign judgment of *non pros.*⁽³⁾ The plaintiff may, any time before trial, take the money out of court and obtain his costs, but the defendant is entitled to any subsequent costs he has incurred.⁽⁴⁾ Where, after the cause had been made a remanet, the plaintiff was allowed to amend, and the defendant then paid money into court which the plaintiff took out, the plaintiff was held not entitled to the costs of preparing for trial, but only to the costs up to joinder of issue.⁽⁵⁾ Where, on the cause standing for trial, the plaintiff, at the assizes, obtained leave to amend by striking out four defendants on payment of costs, with liberty to the others to plead *de novo*, who afterwards paid money into court, which was accepted by the plaintiff, it was held that the defendants whose names were struck out were entitled to their entire costs of the cause ; but the plaintiff was entitled to his costs of the cause up to the former pleas of the defendants.⁽⁶⁾ Where the defendant obtained a summons to stay proceedings on payment of a sum of 6s. 4½d., which plaintiff refused, and no order was made, and after declaration defendant paid in 7s., which plaintiff took out in satisfaction, it was held the plaintiff was not disentitled to the costs incurred subsequently to the offer.⁽⁷⁾ If the plaintiff proceed in the action after money is paid in, and then discontinue,⁽⁸⁾ or be nonsuit,⁽⁹⁾ or be *nonprossed*,⁽¹⁰⁾ the plaintiff will not be entitled to costs, even to the time of paying the money into court. If, at the trial of a cause, in which money has been paid into court, a juror

(1) *Zeevin v. Cowell*, 2 Taunt. 203. See *Parsons v. Pilcher*, 6 Dowl. 432; *Roe v. Cobham*, 6 Dowl. 628.

(2) *Goodee v. Goldsmith*, 2 M. & W. 202; 5 Dowl. 288: *Emmott v. Standen*, 3 M. & W. 497.

(3) *Ibid.*; *Topham v. Kidmore*, 5 Dowl. 676.

(4) *Hartley v. Bateson*, 1 T. R. 629; *Ib.* 710; *Kelly v. Flint*, 5 Dowl. 293.

(5) *Wilton v. Snook*, 12 M. & W. 805; 1 D. & L. 964.

(6) *Jackson v. Nunn*, 4 Q. B. 209.

(7) *Shaw v. Hughes*, 15 C. B. 660.

(8) *Benrich v. Symonds*, Say. 196.

(9) *Rabell v. Hudson*, 4 T. R. 10.

(10) *Postle v. Beckington*, 6 Taunt. 158; *Crosby v. Olorenshaw*, 2 M. & Sel. 335.

has been withdrawn, each party pays his own costs as in other cases.⁽¹⁾

"When money is paid into court in respect of any particular sum or cause of action in the declaration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed,⁽²⁾ shall be entitled to the costs of the cause in respect of that part of his claim so satisfied up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues in respect of other causes of action, and if the defendant succeeds in defeating the residue of the claim he will be entitled to the costs of the cause in respect of such defence, commencing at 'Instructions for plea,' but not before."⁽³⁾

Where the defendant, in actions of contract, pays into court less than 20*l.*, or in tort less than 5*l.*, and the plaintiff takes it out in full satisfaction, the plaintiff is entitled to his costs notwithstanding 13 & 14 Vict. c. 61, s. 11, without any order from a judge.⁽⁴⁾

Where, in trespass or case, the plaintiff has taken the money out of court, and replied damages *ultra*, and at the trial recovers less than 40*s.*, he is not entitled to his costs without a certificate of the judge under 3 & 4 Vict. c. 24.⁽⁵⁾ And in an action for illegal distress, though he succeed at the trial, he is not entitled to double costs within 11 Geo. 2, c. 19, s. 21.⁽⁶⁾

"Where money is paid into court in several actions, which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one and fails, he shall be entitled to costs on the others up to the time of paying money into court."⁽⁷⁾

8. Plea of Tender.

Where the defendant had legally tendered⁽⁸⁾ the debt before action, and it was refused, he may plead such a plea

(1) *Stodhart v. Johnson*, 3 T. R. 857.

(2) The plaintiff cannot tax these costs till after the other issues are disposed of, *Cauty v. Gyll*, 4 M. & Gr. 907; 5 Sc. N. R. 819.

(3) Rule Pr. 12, H. T. 1853. See *McLean v. Phillips*, 7 C. B. 817; *Rumbelow v. Whalley*, 2 L. M. & P. 245; 16 Q. B. 397.

(4) *Chambers v. Wiles*, 24 L. J. 267, Q. B.; *Elwin v. Newson*, 24 Nov. 1855, Exch.

(5) *Taylor v. Rolfe*, 5 Q. B. 337, ante, p. 450; *Reid v. Ashby*, 13 C. B. 897.

(6) *Hancock v. Foulkes*, 9 M. & W. 431; 1 Dowl. N. S. 659.

(7) Rule Pr. 13, H. T. 1853.

(8) A tender of part of an entire demand is inoperative, *Dixon v. Clarke*, 5 C. B. 365. See also *Bowen v. Owen*, 11 Q. B. 130.

after paying the sum into court. Justices of the peace may, in actions against them for official acts, after notice of action, tender a sum of money as amends to the intended plaintiff, and, if it is refused, afterwards pay it into court and plead a tender.⁽¹⁾ If the defendant plead a tender without first paying the sum into court, the plea is a nullity, and the plaintiff may sign judgment for the amount of the tender.⁽²⁾ If the replication deny the tender, and that issue is found for the plaintiff, and on the other issues it is found that the plaintiff is entitled to no larger sum than the sum paid into court, the defendant must pay the general costs of the cause.⁽³⁾ Hence, in pleading a tender, the defendant runs a risk of having to pay greater costs than he would if only pleading a payment into court. A plea of tender and refusal may, however, be pleaded to an avowry or cognizance, for rent or damage feasant, without paying the money into court.⁽⁴⁾

When the money is paid in on a plea of tender, and the plaintiff confesses the plea, the defendant is entitled to his costs on that plea. When the money is paid in, the plaintiff can take it out, whether he confess or deny the tender.⁽⁵⁾ But the defendant cannot take it out though he obtain a verdict,⁽⁶⁾ though, it seems, if the money is not taken out by the plaintiff, the defendant may apply to have it in discharge of his costs.⁽⁷⁾

(1) See *ante*, p. 709.

(2) *Pether v. Shelton*, 1 Str. 638; *Chapman v. Hicks*, 2 Dowl. 641; 2 Cr. & M. 633.

(3) *Hibbert v. Fox*, 5 Taunt. 660.

(4) Gilb. on "Replev." 83, 179.

(5) *Le Grew v. Cooke*, 1 B. & P. 333.

(6) *Cox v. Robinson*, 2 Str. 1027; *Malcolm v. Fullerton*, 2 T. R. 648. See *Elliott v. Callow*, 2 Salk. 597.

(7) *Cooke's Cas.*, C. B. 54, 117.

CHAPTER XXX.

INTERPLEADER.

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 1. *Remedy of Defendants generally.*

(a) *Statute.*]—The statute 1 & 2 Will. 4, c. 58,⁽¹⁾ authorized a defendant who was sued at law for the recovery of money or goods, in which he had no interest, and which were also claimed by a third party, to relieve himself as follows: "Upon application made by or on behalf of any defendant, in any action of assumpsit, debt, detinue, or trover, such application being made *after declaration and before plea, by affidavit*, or otherwise, showing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as the court or any judge thereof may order or direct, it shall be lawful for the court,

⁽¹⁾ As to interpleader in the county courts see *Bloor v. Huston*, 15 C. B. 266; *Fraser v. Fothergill*, 14 C. B. 298; *Jessopp v. Crawley*, 15 Q. B. 212; *Cater v. Chigwell*, 15 Q. B. 217; *Mercer v. Stanberry*, 10 June, 1856, Exch.

or any judge thereof, to make rules and orders, calling upon such third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim, and upon such rule or order to hear the allegations as well of such third party as of the plaintiff, and in the mean time to stay the proceedings in such action, and, finally, to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues, and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel or attorneys, to dispose of the merits of their claims and determine the same in a summary manner, and to make such other rules and orders therein as to costs, and all other matters as may appear to be just and reasonable:" (s. 1.) The judgment of the court in any such action or issue, and the decision of the court or judge, in a summary manner, shall be final and conclusive against the parties, and all persons claiming by, from, or under them: (s. 2.) If such third party shall not appear, upon such rule or order, to maintain or relinquish his claim, being duly served therewith, or shall neglect or refuse to comply with any rule or order, to be made after appearance, it shall be lawful for the court or judge to declare such third party, and all persons claiming by, from, or under him, to be for ever barred⁽¹⁾ from prosecuting his claim against the original defendant, his executors or administrators (saving, nevertheless, the right or claim of such third party against the plaintiff), and thereupon to make such order between such defendant and the plaintiff as to costs and other matters as may appear just and reasonable: (s. 3.) Every order made by a judge not sitting in open court is liable to be rescinded or altered by the court: (s. 4.) But a judge, instead of himself deciding upon the application, may refer it to the court: (s. 5.) All rules, orders, matters and decisions to be made and done in pursuance of this act (except only the affidavits to be filed) may, together with the declaration in the cause, be entered of record, with a note in the margin expressing the true date of such entry, to the end that the cause may be evidence in future times, if required, and to secure and enforce the payment of costs directed by any such rule or order, and every such rule or order so entered shall have the force and effect of a judgment (except only

(1) See a case where he was barred, *Lucas v. London Dock Company*, 4 B. & Ad. 378.

as to becoming a charge on any lands, tenements, or hereditament), in case any costs shall not be paid within fifteen days after notice of the taxation and amount thereof given to the party ordered to pay the same, his agent or attorney, execution may issue for the same by *fieri facias* or *ca. sa.* adapted to the case, together with the costs of such entry and of the execution, if by *fi. fa.*, and such writ and writs may bear teste on the day of issuing the same, whether in term or vacation, and the sheriff or other officer executing any such writ shall be entitled to the same fees, and no more, as upon any similar writ grounded upon a judgment of the court : (s. 7.)

(b) *In what cases.*]—The following cases have been held within the statute : where the acceptor was sued on the same bill by two persons, claiming to be holders ;⁽¹⁾ where the defendant bought the goods from a factor whose assignee and consignor, both claimed the price ;⁽²⁾ where two persons were jointly sued in trover for goods and one claimed no title.⁽³⁾

The following cases have been held *not* within the benefit of the act : trover for title deeds ;⁽⁴⁾ action for a reward advertised ;⁽⁵⁾ for dividends in a railway company ;⁽⁶⁾ for a stake on an illegal race ;⁽⁷⁾ where the Crown is a party,⁽⁸⁾ or a foreigner residing abroad ;⁽⁹⁾ where the defendant has taken an indemnity from the claimant,⁽¹⁰⁾ or himself sets up a claim ;⁽¹¹⁾ where the claim is substantially for unliquidated damages ;⁽¹²⁾ or where the defendant has, by his own act, incurred a personal claim in respect of the subject-matter,⁽¹³⁾

(1) *Regan v. Serle*, 9 Dowl. 193.

(2) *Johnson v. Shale*, 4 M. & Gr. 916.

(3) *Gladstone v. White*, 1 Hodg. 386.

(4) *Smith v. Wheeler*, 1 Gale, 163.

(5) *Grant v. Fry*, 4 Dowl. 135.

(6) *Dalton v. Midland Railway Company*, 12 C. B. 458.

(7) *Applegarth v. Colley*, 2 Dowl. N. S. 223.

(8) *Candy v. Maugham*, 1 D. & L. 745 ; 7 Sc. N. R. 401.

(9) *Patorni v. Campbell*, 12 M. & W. 277 ; *Lindsey v. Barron*, 6 C. B. 291.

(10) *Tucker v. Morris*, 1 Cr. & M. 73 ; 1 Dowl. 639.

(11) *Braddock v. Smith*, 9 Bing. 84 ; 2 M. & Sc. 131. But if the defendant has a lien against all parties, he may be relieved if he relinquish it : *Cotter v. Bank of England*, 2 Dowl. 728 ; 3 M. & Sc. 180.

(12) *Walter v. Nicholson*, 6 Dowl. 517.

(13) *Patorni v. Campbell*, 12 M. & W. 277 ; *Horton v. Earl of Devon*, 4 Exch. 497 ; *Lindsey v. Barron*, 6 C. B. 291.

or officiously interfered between the claimants.⁽¹⁾ The court has refused to interfere where the parties claim different things, as one claiming the goods and another the price;⁽²⁾ and where the defendant did not know with whom he contracted.⁽³⁾

(c) *Application for order.*—The application is generally made to a judge at chambers; and if two actions are brought, the defendant must apply to a judge of each court.⁽⁴⁾ There must be an affidavit of the facts properly intitled in the action,⁽⁵⁾ and showing the stage of the cause.⁽⁶⁾ The particulars which it ought to contain are specified by the statute.⁽⁷⁾

The parties may at the hearing consent that the court or judge should dispose of the claim in a summary manner.⁽⁸⁾ If the claimant appears and persists, he should in general be supported by an affidavit;⁽⁹⁾ and he will be made defendant in the place of the original defendant, and an issue will be directed to try the question, the subject-matter of dispute being kept in court or safe custody. The court may, in some cases, order the original defendant to find security for costs before the claimant will be substituted,⁽¹⁰⁾ or to pay the sum in dispute into court.⁽¹¹⁾ The court may enlarge the rule so as to let in a party subsequently claiming;⁽¹²⁾ but the rule will not be altered without the plaintiff having been made a party to the application.⁽¹³⁾

(d) *Issue and subsequent proceedings.*—The issue is framed by the party ordered to be the plaintiff, and the order either limits a time for the trial or it may be amended so as to do so. A new trial of the issue may be had as in other cases;⁽¹⁴⁾

(1) *Belcher v. Smith*, 9 Bing. 82; 2 M. & Sc. 184.

(2) *Slaney v. Sidney*, 14 M. & W. 800.

(3) *Turner v. Mayor of Kendal*, 2 D. & L. 197; 13 M. & W. 171.

(4) *Allen v. Gilby*, 3 Dowl. 143.

(5) *Parinte v. Pennell*, 7 Sc. N. R. 834.

(6) *Frost v. Heywood*, 2 Dowl. N. S. 801.

(7) Sect. 1, *ante*, p. 919.

(8) 1 & 2 Will. 4, c. 51, *ante*, p. 290; *Harrison v. Wrig'it*, 13 M. & W. 816; 2 D. & L. 695.

(9) *Webster v. Delafield*, 18 L. J. 186, C. P.; 7 C. B. 187.

(10) *Deller v. Prickett*, 20 L. J. 151, Q. B.

(11) *Allen v. Gilby*, 3 Dowl. 143.

(12) *Kirk v. Clarke*, 4 Dowl. 363.

(13) *Lydal v. Biddle*, 5 Dowl. 244.

(14) *James v. Whitbread*, 11 C. B. 406.

but there can be no error brought on the judgment, nor any bill of exceptions.⁽¹⁾ When judgment is signed, the party succeeding may apply to the court to have the money or property delivered to him,⁽²⁾ and the court will enforce its order, though a suit in Chancery may be pending as to the subject-matter.⁽³⁾ This application for an order is for a summons *nisi* only,⁽⁴⁾ and is made to a judge of the court where the original action was brought;⁽⁵⁾ and if the judge, who made the interpleader order, reserved the question of costs, it should be made to him.⁽⁶⁾

(c) *Costs.*—The party applying for the order is generally allowed his costs of the application out of the proceeds of the subject-matter;⁽⁷⁾ and the party succeeding is left to recover such sum by action from the other claimant.⁽⁸⁾ Where, however, the defendant was offered an indemnity for these costs, but refused it, the court refused to allow them.⁽⁹⁾ Where the claimant does not appear, the court will not order the costs to be paid out of the fund,⁽¹⁰⁾ nor by such claimant.⁽¹¹⁾

The party succeeding on the issue is generally entitled to his costs of the issue, though he do not succeed on the whole of his claim.⁽¹²⁾ Sometimes the costs are given to neither party.⁽¹³⁾ The costs of the cause or issue include all the steps incidental to it;⁽¹⁴⁾ as of an application for an order

(1) *King v. Simmonds*, 7 Q. B. 312; 1 Ho. L. Cas. 754; *King v. Birch*, 7 Q. B. 669.

(2) *Cooper v. Lead Smelting Company*, 9 Bing. 634; 1 Dowl. 728.

(3) *Smith v. Clinch*, 2 Dowl. N. S. 48.

(4) *Stanley v. Perry*, 1 Har. & W. 669.

(5) *Levi v. Coyle*, 2 Dowl. N. S. 932.

(6) *Marks v. Ridgway*, 1 Exch. 8.

(7) *Parker v. Linnett*, 2 Dowl. 562; *Id.* 728; *Reeves v. Barrant*, 7 Sc. 281; but an auctioneer was refused his costs out of a sum deposited in his hands, *Deller v. Prickett*, 20 L. J. 151, Q. B.

(8) *Pitchers v. Edney*, 4 Bing. N. C. 721; 6 Sc. 582.

(9) *Gladstone v. White*, 1 Hodg. 386; *Jones v. Regan*, 9 Dowl. 580.

(10) *Lambert v. Cooper*, 5 Dowl. 547; *Murdock v. Taylor*, 8 Sc. 604; 6 Bing. N. C. 293.

(11) *Jones v. Lewis*, 8 M. & W. 264; 9 Dowl. 652; *Lambert v. Cooper*, 5 Dowl. 547; *Grazebrook v. Pickford*, 10 M. & W. 279; 2 Dowl. N. S. 249.

(12) *James v. Whitbread*, 11 C. B. 408.

(13) *Lewis v. Holding*, 3 Sc. N. B. 191; 2 M. & Gr. 875; 9 Dowl. 652; *Carr v. Edwards*, 8 Sc. 337; 8 Dowl. 29; *Staley v. Bedwell*, 10 A. & E. 145.

(14) *Cusel v. Pariente*, 7 M. & Gr. 527; *Melville v. Smark*, 3 M. & Gr. 57; 5 Sc. N. B. 357.

to deliver up the property or pay the money out of court,⁽¹⁾ and to force the plaintiff to trial.⁽²⁾ The plaintiff in the issue may be made to find security for costs, as in other cases.⁽³⁾

(b) *Entering on record.*]—The proceedings must be entered on a judgment roll, and carried in as directed in sect. 7, *ante*, p. 920, and it is irregular to sign judgment in the usual way.⁽⁴⁾

Execution.]—The successful party may either sue out execution by *fi. fa.* or *ca. sa.*, under the 7th section *ante*, p. 920, or he may have execution on the rule of court under 1 & 2 Vict. c. 110, s. 18.⁽⁵⁾

2. Relief by Sheriffs.

(a) *Statute.*]—When goods taken by the sheriff under an execution are claimed by third parties, he may apply to the court for an enlargement of time for making the return.⁽⁶⁾ His more effectual remedy is, however, by applying for an interpleader order under the statute 1 & 2 Will. 4, c. 58, s. 6; thus, “when any claim shall be made to any goods or chattels, taken or intended to be taken in execution under any process of the superior courts, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process is issued, upon application of such sheriff or other officer, to call before them by rule of court as well the party issuing such process as the party making such claim, and thereupon to exercise for the adjustment of such claims, and the relief and protection of the sheriff or other officer all or any of the powers and authorities hereinbefore contained,⁽⁷⁾ and make such rules and decisions as shall appear to be just, according to the

(1) *Ibid.*; *Meredith v. Rogers*, 7 Dowl. 596; *Id.* 319.

(2) *Kimberley v. Hickman*, 1 B. C. 90. The costs for not proceeding to trial will generally be refused until the cause is at an end, *Wood v. Bradbury*, 6 M. & Gr. 981; 7 Sc. N. R. 892.

(3) *Benazech v. Bessett*, 1 C. B. 313; *Williams v. Crosling*, 3 C. B. 957; *Webster v. Delafield*, 7 C. B. 187; 4 D. & L. 660.

(4) *Dickenson v. Eyre*, 7 Q. B. 307; 7 Dowl. 721; *Lambert v. Barrington*, 2 Bing. N. C. 149; 4 Dowl. 126.

(5) *Cetti v. Bartlett*, 9 M. & W. 840; 1 Dowl. N. S. 928. See post “Rules.”

(6) See *Roach v. Wright*, 8 M. & W. 155; 1 Dowl. N. S. 56; *Holmes v. Musty*, 4 A. & E. 131.

(7) *Ante*, p. 919.

circumstances of the case; and the costs of all such proceedings shall be in the discretion of the court." The same power is extended to any judge of the superior courts, or of the Common Pleas of Lancaster or Durham respectively.⁽¹⁾

(b) *In what cases.*]—The sheriff, or his officer, is the party entitled to apply under this section of the act, and not the party against whom the process issues; and the sheriff may apply even though the execution creditor has abandoned his process before the goods were sold.⁽²⁾ The sheriff need not, in all cases, wait until he actually seize the goods;⁽³⁾ but the claim must have been actually made. Mere notice of bankruptcy is not, it seems, a sufficient claim by assignees.⁽⁴⁾ And the claim must be one which a court of law can recognize,⁽⁵⁾ i. e. such that the claimant may bring an action,⁽⁶⁾ though it need not be actually brought.⁽⁷⁾ The claim may be merely of a lien,⁽⁸⁾ or by the judgment debtor claiming in another character, for example, as executor or trustee,⁽⁹⁾ or by a stranger having possession.⁽¹⁰⁾

The court will not interfere if the sheriff has committed a trespass, over and above merely seizing the goods;⁽¹¹⁾ but a judge or the court has power, under the act, to stay an action brought against the sheriff in such cases.⁽¹²⁾ Nor will the court interfere if the sheriff has exercised a discretion⁽¹³⁾ as by withdrawing from the goods without a seizure, when hearing of the claim;⁽¹⁴⁾ or by paying over the proceeds to the judgment

(1) 1 & 2 Vict. c. 45, s. 2.

(2) *Baynton v. Harvey*, 3 Dowl. 344.

(3) *Lea v. Rossi*, 11 Exch. 13; *Day v. Carr*, 7 Exch. 883.

(4) *Bentley v. Hook*, 2 Cr. & M. 426; 2 Dowl. 339; *Tarleton v. Dummelow*, 5 Bing. N. C. 110; 6 Sc. 843; *Barker v. Phipson*, 3 Dowl. 590.

(5) *Roach v. Wright*, 8 M. & W. 155; 1 Dowl. N. S. 56. See a claim as partner, *Holmes v. Mentz*, 4 A. & E. 127; 4 Dowl. 300. In equitable claims the court will enlarge the time for returning the writ, *Ibid.*

(6) *Isaac v. Spilsbury*, 10 Bing. 3; 2 Dowl. 211.

(7) *Green v. Brown*, 3 Dowl. 337.

(8) *Ford v. Baynton*, 1 Dowl. 359; *Forth v. Simpson*, 13 Q. B. 680.

(9) *Fenwick v. Laycock*, 2 Q. B. 108; 1 G. & D. 532.

(10) *Allen v. Gibbon*, 2 Dowl. 292; *Barker v. Dynes*, 1 Dowl. 169.

(11) *Abbott v. Richards*, 3 D. & L. 487; 15 M. & W. 194; *Hollier v. Laurie*, 3 C. B. 334.

(12) *Winter v. Bartholomew*, 11 Exch. 704.

(13) *Crump v. Day*, 4 C. B. 760.

(14) *Holton v. Guntrip*, 6 Dowl. 130; 3 M. & W. 145.

creditor,⁽¹⁾ though before any claim made;⁽²⁾ or by delivering part of the goods to the claimant,⁽³⁾ or by taking goods under distress for rent,⁽⁴⁾ or by giving precedence to one *fi. fa.* over another.⁽⁵⁾ Nor will the court interfere if the sheriff is interested (as the undersheriff for his client),⁽⁶⁾ or officiously favours a claimant;⁽⁷⁾ or accepts an indemnity;⁽⁸⁾ or has been guilty of neglect,⁽⁹⁾ as by not inquiring into the claim, and whether it is to be persisted in;⁽¹⁰⁾ or by not looking at the date of a bill of sale;⁽¹¹⁾ or by trying to negotiate with the party.⁽¹²⁾

(c) *The application for the order.*—The application is made either to the court or a judge. If there are two writs of *fi. fa.* issuing from different courts, the application must be made to each court.⁽¹³⁾ The application must be made promptly after hearing of the claim,⁽¹⁴⁾ unless under special circumstances;⁽¹⁵⁾ otherwise the sheriff may have to pay the costs of the parties.⁽¹⁶⁾ Eight days have been held too late.⁽¹⁷⁾

There must be an affidavit stating the seizure and claim,⁽¹⁸⁾ which must set out all the grounds of the application;⁽¹⁹⁾ but it need not negative collusion.⁽²⁰⁾

The order may be made by consent, in which case it is binding, though the judge had no jurisdiction.

(1) *Anderson v. Calloway*, 1 Cr. & M. 182; 1 Dowl. 636.

(2) *Ibid.*; *Scott v. Lewis*, 2 C. M. & R. 289; 4 Dowl. 259; *Ireland v. Bushell*, 5 Dowl. 147.

(3) *Braine v. Hunt*, 2 Cr. & M. 418; 2 Dowl. 391.

(4) *Haythorn v. Bush*, 2 Dowl. 641; *id.* 189, 227.

(5) *Day v. Waldock*, 1 Dowl. 523; *id.* 369.

(6) *Duddin v. Long*, 1 Bing. N. C. 3 Dowl. 139; 1 Sc. 281; *Ostler v. Bower*, 4 Dowl. 605; 1 Har. & W. 650.

(7) *Cox v. Balne*, 2 D. & L. 718.

(8) *Ostler v. Bower*, 4 Dowl. 605; *Levy v. Champneys*, 2 Dowl. 454; *Crossley v. Ebers*, 1 Har. & W. 216.

(9) *Brackenbury v. Laurie*, 3 Dowl. 180; *Lewis v. Jones*, 2 M. & W. 203.

(10) *Bishop v. Hinzman*, 2 Dowl. 166.

(11) *R. v. Sheriff of Oxfordshire*, 6 Dowl. 136.

(12) *Mutton v. Young*, 4 C. B. 371.

(13) *Bragg v. Hopkins*, 2 Dowl. 151.

(14) *Crump v. Day*, 4 C. B. 760; *Mutton v. Young*, 4 C. B. 371; *Barker v. Phipson*, 3 Dowl. 590.

(15) *Dixon v. Ensell*, 2 Dowl. 621; *id.* 781.

(16) *Beale v. Overton*, 2 M. & W. 534; 5 Dowl. 599; *Sablesman v. Claringbold*, 2 Har. & W. 87.

(17) *Ridgway v. Fisher*, 3 Dowl. 567.

(18) *Northcote v. Beauchamp*, 1 M. & Sc. 154.

(19) *Cooke v. Allen*, 2 Dowl. 11; 1 Cr. & M. 542.

(20) *Domínger v. Hinzman*, 2 Dowl. 424; *id.* 509.

(d) *Showing cause.*—The only party entitled to show cause is the party called upon by the rule,⁽¹⁾ though the party's assignees,⁽²⁾ and even the creditors' assignees, for the official assignees who were served with the rule, have been heard.⁽³⁾ On showing cause, it seems an affidavit must be produced by the claimant, setting forth the grounds of his claim,⁽⁴⁾ though it need not be made by himself;⁽⁵⁾ and it may be sworn at any time before cause shown.⁽⁶⁾ The claimant need not take office copies of the applicant's affidavits.⁽⁷⁾ If the claimant do not appear, his claim is barred as against the sheriff, though not as against the execution creditor.⁽⁸⁾ If the execution creditor fail to appear, his claim is barred as against the sheriff, and the latter will be directed to withdraw from possession or pay the proceeds to the claimant.⁽⁹⁾ If once allowed to withdraw, the sheriff cannot be made to re-enter after going out of office.⁽¹⁰⁾ If neither the claimant nor execution creditor appear, the sheriff may pay himself his poundage and withdraw from possession.

The judge or court may dispose of the claim in a summary way, with the consent of the claimant and execution creditor,⁽¹¹⁾ and there can be no appeal against such decision.⁽¹²⁾

If the rule is discharged, the sheriff will be entitled to a reasonable time to return the writ.⁽¹³⁾

(e) *The order.*—If the court or judge be of opinion that it is a proper case for interfering, then an issue is directed or an action against the sheriff allowed to be defended by one of the claimants;⁽¹⁴⁾ or if an action has been already

(1) *Clarke v. Lord*, 2 Dowl. 55.

(2) *Kirk v. Clarke*, 4 Dowl. 363.

(3) *Ibbotson v. Chandler*, 9 Dowl. 250.

(4) *Powell v. Leck*, 3 A. & E. 315; 4 N. & M. 852.

(5) *Webster v. Delafield*, 7 C. B. 187.

(6) *Brame v. Hunt*, 2 Dowl. 391.

(7) *Mason v. Redshaw*, 2 Dowl. 595.

(8) *Boulder v. Smith*, 1 Dowl. 417; *Perkins v. Burton*, 2 Dowl. 108; 3 Tyr. 51, 52; *Ford v. Dilly*, 5 B. & Ad. 885.

(9) *Doble v. Cummins*, 7 A. & E. 580; 2 N. & P. 575; *Eveleigh v. Salisbury*, 3 Bing. N. C. 298; 5 Dowl. 424. But see *Donniger v. Hinzman*, 2 Dowl. 424.

(10) *Wilton v. Chambers*, 3 Dowl. 12.

(11) 1 & 2 Will. 4, c. 58, s. 1; *Curlewis v. Pocock*, 5 Dowl. 331; *Ford v. Baynton*, 1 Dowl. 357.

(12) *Shortridge v. Young*, 12 M. & W. 5; 1 D. & L. 416.

(13) *R. v. Sheriff of Hertfordshire*, 5 Dowl. 144.

(14) *Harrison v. Wright*, 13 M. & W. 816; 2 D. & L. 695; *Allen v. Gibbons*, 2 Dowl. 292; *id.* 59; *Sloman v. Back*, 3 B. & Ad. 103.

brought against the sheriff, will direct it to be stayed, and order the goods or proceeds to be dealt with.⁽¹⁾ When an issue is directed, the claimant is generally made the plaintiff of the issue, and the execution creditor the defendant;⁽²⁾ and the plaintiff, as in ordinary actions, may be called on to give security for costs.⁽³⁾

The judge's order may be reviewed by the court,⁽⁴⁾ when the court may amend it on payment of the costs (except the sheriff's) of opposing the rule.⁽⁵⁾ If the trial of an issue become useless, the parties should apply to have the order discharged.⁽⁶⁾

(f) *The issue.*—The issue must be in the form directed by the order, and care should be taken in so framing it that evidence of material points may not be excluded at the trial.⁽⁷⁾

(g) *Costs.*—The costs generally are stated by the statute to be in the discretion of the court or judge making the order. If a judge made the order, then the court has no jurisdiction as to costs.⁽⁸⁾ The party must apply to the judge or court by whom the issue was directed for a rule or order *nisi* for the costs, which may be done before judgment is actually signed;⁽⁹⁾ but an application should first be made to the opposite party for these costs.⁽¹⁰⁾ The successful party is, however, entitled to the costs of applying to take the money

(1) *Ibid.* See *Brown v. Ludham*, 6 Sc. N. R. 934.

(2) *Bramidge v. Adshead*, 2 Dowl. 59.

(3) *Webster v. Delafield*, 7 C. B. 187; *Williams v. Crossling*, 3 C. B. 957.

(4) *Teggin v. Langford*, 10 M. & W. 556; 2 Dowl. N. S. 467; *Webster v. Delafield*, 7 C. B. 187.

(5) *Tillyard v. Cave*, 6 Bing. N. C. 261; 8 Sc. 511.

(6) *Luckin v. Simpson*, 8 Sc. 511.

(7) See *Gadsden v. Barrow*, 9 Exch. 514, where the execution creditor was entitled to set up a prior bill of sale; *Linnet v. Chaffers*, 4 Q. B. 762, where the plaintiff could not dispute the bankruptcy; *Lott v. Melville*, 3 M. & Gr. 40, where the plaintiffs (assignees) were bound to prove the trading, &c.; *Carne v. Brice*, 7 M. & W. 183, *Belcher v. Patten*, 6 C. B. 608, where a *jus tertii* could not be set up; *Rogers v. Kenney*, 9 Q. B. 592, where the claim was proved by showing a lien; *Edwards v. Matthews*, 16 L. J. 291 Exch., where the right to begin was in dispute; *Cools v. Braham*, 3 Exch. 183, as to admissions of an assignor of the goods.

(8) *Marks v. Ridgway*, 1 Exch. 8; *Burgh v. Schofield*, 9 M. & W. 478; 2 Dowl. N. S. 261.

(9) *Ibid.*; *Bland v. Delano*, 6 Dowl. 293.

(10) *Boucer v. Bramridge*, 2 Dowl. 213; *Scales v. Sargesar*, 3 Dowl. 707.

out of court, or to have the goods delivered to him, though he has not previously applied for the consent of the other party.⁽¹⁾ An affidavit in support of the application to the court should be intituled in the original cause.⁽²⁾

If the claimant has not appeared to show cause, the court or judge cannot order him to pay the costs of the application.⁽³⁾ So, if the execution creditor do not appear, it seems he cannot be made to pay the claimant's costs.⁽⁴⁾ The claimant, will, however, be made to pay the execution creditor's costs, when the former abandons his claim,⁽⁵⁾ or neglects to pay money into court as ordered.⁽⁶⁾ So, the execution creditor will be made to pay the claimant's costs, if he abandon his claim.⁽⁷⁾

The costs of an issue, or of several issues, when nothing is said about them in the order, follow the event as in ordinary cases, and are paid by the unsuccessful party,⁽⁸⁾ though the order may have been made by a judge at chambers with consent.⁽⁹⁾ The assignee of a bankrupt, if unsuccessful, must pay the costs as in other cases.⁽¹⁰⁾

Costs of the sheriff.]—As the remedy by an interpleader issue is deemed for the protection and benefit of the sheriff, he is not generally allowed his costs of the application for the order ; ⁽¹¹⁾ unless the conduct of the claimant is vexatious,⁽¹²⁾ or the claimant seeks to open the rule or order made, without any fault of the sheriff.⁽¹³⁾ Where the sheriff had delayed the application while the parties were negotiating, and the claimant afterwards abandoned his claim,

⁽¹⁾ *Meredith v. Rogers*, 7 Dowl. 596; *ibid.* 319.

⁽²⁾ *Elliott v. Sparrow*, 1. Har. & W. 370; *Levi v. Ayle*, 2 Dowl. N. S. 932.

⁽³⁾ *Grazebrook v. Pickford*, 10 M. & W. 279; 2 Dowl. N. S. 249.

⁽⁴⁾ *Swaine v. Spencer*, 9 Dowl. 347; *Beswick v. Thomas*, 5 Dowl. 458; *Glazier v. Cooke*, 5 N. & M. 680.

⁽⁵⁾ *Wills v. Hopkins*, 3 Dowl. 346.

⁽⁶⁾ *Scales v. Sargeson*, 3 Dowl. 787; 4 Dowl. 232.

⁽⁷⁾ *Dabbs v. Humphries*, 1 Bing. N. C. 412; 3 Dowl. 377.

⁽⁸⁾ *Bowen v. Bramridge*, 2 Dowl. 213; *Staley v. Beddoell*, 10 A. & E. 145; see also *ante*, p. 436.

⁽⁹⁾ *Matthews v. Sims*, 4 Dowl. 234.

⁽¹⁰⁾ *Melville v. Smark*, 3 M. & Gr. 57; 3 Sc. N. R. 357.

⁽¹¹⁾ *Bowdler v. Smith*, 1 Dowl. 418; *ibid.* 430, 520, 528; *Scales v. Sargeson*, 4 Dowl. 232.

⁽¹²⁾ *Cox v. Fenn*, 7 Dowl. 50.

⁽¹³⁾ *Briant v. Ikey*, 1 Dowl. 428; but it is otherwise if the time is merely enlarged, *Tillyard v. Cave*, 6 Bing. N. C. 261; 8 Sc. 511.

each was made to pay his own costs.⁽¹⁾ Though the claimant does not appear, this is no ground for giving the sheriff his costs.⁽²⁾ Nor can the sheriff include the costs of the interpleader rule in the levy.⁽³⁾ If he has allowed an attachment to issue for not returning the writ, the rule may be made absolute on his paying the costs of the attachment.⁽⁴⁾ If the rule or summons is discharged, the sheriff is often made to pay the costs, especially if he has shown want of promptitude or vigilance.⁽⁵⁾ Where the sheriff had made the landlord a party to the rule, he was ordered to pay the rent to the latter, on security being given at the sheriff's expense, and also the landlord's costs of the application.⁽⁶⁾

The sheriff's claim to poundage depends on the legality of the seizure,⁽⁷⁾ and he is generally ordered to pay the whole proceeds into court without deduction, to abide the event of the issue or action.⁽⁸⁾ If the execution creditor succeeds in whole or part, then the poundage fees and expenses of execution will be payable, or a proportion, out of the proceeds; and if neither the execution creditor nor the claimant appear, the court will order part of the goods to be sold to pay the poundage fees and expenses.⁽⁹⁾ Where the sheriff is ordered to keep possession of goods, &c., after the order of interpleader is made, he seems entitled to be paid the costs of doing so by the losing party,⁽¹⁰⁾ especially if he thereby acts out of his ordinary duty for the benefit of both the parties.⁽¹¹⁾ So, he is allowed his costs of selling the goods, &c., by order of the court.⁽¹²⁾

(1) *Dixon v. Ensell*, 2 Dowl. 621.

(2) *Jones v. Lewis*, 8 M. & W. 264; 9 Dowl. 652.

(3) *Hammond v. Nairn*, 9 M. & W. 221.

(4) *Almore v. Adeane*, 3 Dowl. 408.

(5) *Bishop v. Hinzman*, 2 Dowl. 166; *Clarke v. Lord*, 2 Dowl. 227; *Re Sheriff of Oxfordshire*, 6 Dowl. 136.

(6) *Clarke v. Lord*, 2 Dowl. 227.

(7) *Barker v. Dynes*, 1 Dowl. 169.

(8) *Ibid.*; *Clarke v. Chetwode*, 4 Dowl. 635.

(9) *Eveleigh v. Salisbury*, 3 Bing. N. C. 298; 5 Dowl. 369.

(10) *Dabbs v. Humphries*, 1 Bing. N. C. 412; 3 Dowl. 377; *Scales v. Sargeson*, 4 Dowl. 231; *Armitage v. Foster*, 1 Har. & W. 208; *Gaskell v. Sefton*, 14 M. & W. 802; 3 D. & L. 267.

(11) *Underden v. Burgess*, 4 Dowl. 104.

(12) *Browne v. Delano*, 6 Dowl. 293; *Dabbs v. Humphries*, 3 Dowl. 377; 1 Hodg. 4; *West v. Rotheram*, 2 Bing. N. C. 527.

CHAPTER XXXI.

PROCEEDINGS IN EJECTMENT.

I. EJECTMENT IN ORDINARY CASES.

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|---|---|
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 (d) Teste of writ.
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| <ul style="list-style-type: none"> (h) Mesne profits. (i) Form of verdict. (k) Costs. (l) Death of party after verdict. | <ul style="list-style-type: none"> (b) What writs may issue. (c) Teste and return of writ. (d) Execution of <i>habere facias possessionem</i>. (e) Forms of writs of execution. |
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10. Judgment and execution.
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| <ul style="list-style-type: none"> (a) Judgment; how and when signed. | <ul style="list-style-type: none"> 11 Error. |
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II. PROCEEDINGS WHERE EJECTMENT IS BY LANDLORD FOR FORFEITURE BY NON-PAYMENT OF RENT WHERE THERE IS NO SUFFICIENT DISTRESS ON THE PREMISES.

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| <ul style="list-style-type: none"> (a) When proceedings may be taken. (b) Service or affixing of writ. (c) Payment of arrears. | <ul style="list-style-type: none"> (d) Judgment, &c. (e) Proceedings by tenant in equity. (f) Costs. |
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III. PROCEEDINGS WHERE EJECTMENT IS BY LANDLORD AFTER DETERMINATION OF TERM.

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| <ul style="list-style-type: none"> (a) Notice requiring tenant to find bail. (b) In what cases may be served. (c) Form of notice. (d) Bail. (e) Default to find bail. | <ul style="list-style-type: none"> (f) Form of judgment in case of default. (g) Trial. (h) Staying execution, &c. (i) Recognizances and securities; how to be taken. |
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IV. ACTION FOR MESNE PROFITS.

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| <ul style="list-style-type: none"> (a) Nature of action. | <ul style="list-style-type: none"> (b) Amount of damages. |
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I. EJECTMENT IN ORDINARY CASES.

1. Nature of the Action.

Ejectment is now the only action for the specific recovery of land.

(a) *Jurisdiction of court over proceedings.*—Previous to the passing of the Common Law Procedure Act, 1854, the proceedings in the action commenced by the service upon the persons in possession of the premises of a declaration, in which a fictitious lease to an imaginary plaintiff was stated, and it was alleged that he had entered and been ousted by an

imaginary defendant, and of an accompanying notice requiring the persons served to appear and defend the action. This declaration and notice are now abolished, and the entire proceedings altered and improved by the Common Law Procedure Acts, and the rules of court; but it is provided by the act of 1852, s. 221, that "the several courts and the judges thereof respectively shall and may exercise over the proceedings the like jurisdiction as heretofore exercised in the action of ejectment, so as to insure a trial of the title and of actual ouster, when necessary only, and for all other purposes for which such jurisdiction may at present be exercised, and the provisions of all statutes not inconsistent with the provisions of this act, and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto." It has been said that the court exercises an equitable jurisdiction over the proceedings in an action of ejectment, which may be said to be peculiarly its own creature.⁽¹⁾

2. *The Writ.*

The writ.]—By the Common Law Procedure Act, 1852, s. 148,⁽²⁾ it is enacted, that "instead of the present proceeding by ejectment, a writ shall be issued." Sect. 159 provides, that "the writ shall state the names of all the persons in whom the title is alleged to be, and command the persons to whom it is directed to appear within sixteen days after service thereof in the court from which it is issued, to defend the possession of the property sued for, or such part thereof as they may think fit, and it shall contain a notice that, in default of appearance, they will be turned out of possession."

By landlord for recovery of lands not in London or Middlesex.]—By the Common Law Procedure Act, 1852, s. 217, it is provided, that "in all actions of ejectment hereafter to be brought in any of her Majesty's courts at Westminster, by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments in any county, except London or Middlesex, where the tenancy shall expire, or

⁽¹⁾ Per Bayley, J., in *Thrustout v. Shenton*, 10 B. & C. 111.

⁽²⁾ This does not apply to actions commenced before the act came into operation, *Doe d. Smith v. Roe*, 9 Exch. 127.

the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after Hilary or Trinity terms respectively, it shall be lawful for the claimant in such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a writ in ejectment, in the form contained in the schedule A to this act annexed, marked No. 13,⁽¹⁾ except that it shall command the person to whom it is directed to appear, within ten days after service thereof, in the court in which such action may be brought."

(a) *Form of writ.*—The writ must be in the form contained in the schedule (A) No. 13, to the Common Law Procedure Act, 1852, annexed; care should be taken, where the case is within the 217th section of the act, to substitute "ten" for "sixteen" days in the command to appear. The following is the form so prescribed:—

VICTORIA, &c., to X. Y. Z. and all persons entitled to defend the possession of , [describe the property with reasonable certainty] in the parish of , in the county of , to the possession whereof A. B. and C., some or one of them claim to be [or to have been on and since the day of , A.D.] entitled, and to eject all other persons therefrom: These are to will and command you, or such of you as deny the alleged title, within sixteen days after service hereof, to appear in our Court of , to defend the said property, or such part thereof as you may be advised, in default whereof judgment may be signed, and you turned out of possession.

(b) *Indorsement on writ.*—The name and abode of the attorney issuing the writ, or, if no attorney, the name and residence of the party, must be indorsed thereon in like manner as enacted by the Common Law Procedure Act, 1852, with reference to the indorsements on a writ of summons in a personal action; and the same proceedings may be had to ascertain whether the writ was issued by the authority of the attorney whose name was indorsed thereon, and who and what the claimants are, and their abode, and as to staying the proceedings upon writs issued without authority, as in the case of writs in personal actions.⁽²⁾ The practitioner is therefore referred for the practice upon this point to *ante*, p. 87, where the subject is treated of.

⁽¹⁾ See *infra*.

⁽²⁾ C. L. P. Act, 1852, s. 159.

(c) *Direction of writ.*]—The writ must be directed to the persons in possession by name, and “to all persons entitled to defend the possession of the property claimed.”⁽¹⁾ The christian as well as the surname of the tenant should be inserted where it can be ascertained.⁽²⁾ Under the old practice it was held that a notice directed to the “assignees and personal representatives” of a deceased tenant, without naming them, was good.⁽³⁾

(d) *Teste of writ.*]—The writ must bear teste of the day on which it is issued.⁽⁴⁾

(e) *Description of property.*]—The property must be described in the writ with reasonable certainty.⁽⁵⁾ But want of reasonable certainty in the description of the property in the writ does not nullify it, but is only ground for an application to a judge for better particulars of the land claimed, which a judge has power to give in all cases.⁽⁶⁾

3. Service of Writ.

(a) *Within what time.*]—The writ remains in force for three months only,⁽⁷⁾ and it must therefore be served within that time. Service on a Sunday is bad.⁽⁸⁾

(b) *How service made.*]—Save where otherwise ordered by the court or judge, or in the case of vacant possession, the writ is served in the same manner as an ejectment under the old practice.⁽⁹⁾ A copy of the writ should be served on each of the tenants in possession.⁽¹⁰⁾ Service on one of several joint tenants, if all be named in the writ, is sufficient.⁽¹¹⁾ Where a firm is in possession, it is enough if service be effected on the acting partner ;⁽¹²⁾ and service on

(1) C. L. P. Act, 1852, s. 148.

(2) *Doe d. Smith v. Roe*, 6 Dowl. 629.

(3) *Harrington v. Assignees &c. of Bytham*, 2 C. L. R. 1033 ; but see *Doe d. St. Margaret v. Roe*, 1 Moore, 113.

(4) C. L. P. Act, 1852, s. 148.

(5) *Ibid.*

(6) *Ibid.*, s. 175 ; see *Doe d. Saxton v. Turner*, 11 C. B. 896.

(7) C. L. P. Act, 1852, s. 159.

(8) *Doe d. Warren v. Roe*, 8 D. & R. 342.

(9) C. L. P. Act, 1852, s. 170.

(10) *Doe d. Lord Darlington v. Cook*, 4 B. & C. 259.

(11) *Doe d. Bennet v. Roe*, 7 C. B. 137 ; *Doe d. Brady v. Roe*, 10 C. B. 668.

(12) *Doe d. Overton v. Roe*, 9 Dowl. 1039.

one of two co-executors in possession of the premises is good.⁽¹⁾ The service should be personal on the tenant or his wife. In the former case the service may be anywhere.⁽²⁾ In the latter it must be on the premises, or at the husband's dwelling-house or place of business.⁽³⁾ It has been questioned⁽⁴⁾ whether it is necessary, under the new practice as under the old, that the writ should be explained, or read over and explained, at the time of service.⁽⁵⁾ If the party served refuse to listen, or turn out the person effecting the service, or leave the place, he ought to explain it in a loud voice.⁽⁶⁾ If the tenant be an attorney no explanation is necessary; ⁽⁷⁾ but in other respects the service must be the same as in ordinary cases.⁽⁸⁾ The service in some cases may be sufficient without manual delivery, as where the person is turned out of the house while explaining it to the tenant, and thrusts the writ under the door.⁽⁹⁾ And where neither the tenant or his wife were at home, and the service was effected on his servant or child, or, it seems, any other person, and it afterwards appeared that the tenant received the document in due time, it was held sufficient service of the declaration, and would therefore appear to be sufficient service of the writ.⁽¹⁰⁾ But in such a case judgment cannot be signed without a rule of court or judge's order for that purpose.⁽¹¹⁾ The neglect to read or explain the writ is a mere irregularity, and may be waived.⁽¹²⁾

(c) *Service in case of vacant possession.*—In the case of vacant possession, service may be effected by posting a copy of the writ upon the door of the dwelling-house, or other conspicuous part of the property.⁽¹³⁾ A mere discontinuance

(1) *Doe d. Strickland v. Roe*, 4 D. & L. 431.

(2) *Doe d. Hope v. Roe*, 3 C. B. 770; *Doe v. Woodroffe*, 7 Dowl. 494.

(3) *Doe d. Royle v. Roe*, 4 C. B. 256; *Doe d. Boallott v. Roe*, 7 Dowl. 463.

(4) *Edwards v. Griffith*, 15 C. B. 397.

(5) *Doe d. Wade v. Roe*, 6 Dowl. 51; *Doe d. Cuttoll v. Roe*, 9 Dowl. 1023.

(6) *Doe d. Summers v. Roe*, 5 Dowl. 552.

(7) *Doe d. Portland v. Roe*, 1 Dowl. N. S. 183.

(8) *Doe d. Fowler v. Roe*, 4 D. & L. 639.

(9) *Doe d. Frith v. Roe*, 3 Dowl. 569; *Doe d. Nash v. Roe*, 8 Dowl. 306.

(10) *Doe d. Kenrik v. Roe*, 5 D. & L. 578; *Doe d. Emerson v. Roe*, 6 Dowl. 736.

(11) Reg. Gen. Pr. H. T. 1853, r. 112.

(12) *Edwards v. Griffith*, 15 C. B. 397.

(13) C. L. P. Act, 1852, s. 170.

to occupy will not constitute a vacant possession ; the possession must be entirely abandoned,⁽¹⁾ or the premises be incapable of occupation, as where they are in an unfinished state.⁽²⁾

(d) *Where tenant abroad or evades service.*—Under the old practice, where the court were satisfied upon affidavit that due diligence had been used, and that the tenant resided abroad, or had absconded, or kept out of the way of being served, they granted a rule nisi that service already effected on the attorney of the defendant, a relation, servant, or some other person on the premises, or by posting the declaration on the door, &c., should be deemed good service, and directed in what manner the rule should be served ; or, where satisfied that the person served was an agent of the tenant for the purpose of receiving service, as where he was an attorney or broker, and the key had been left with him, the rule was absolute in the first instance.⁽³⁾ Power is expressly reserved by the Common Law Procedure Act, 1852, s. 170, to the court or a judge to order in what manner service of the writ should be effected, and such power will no doubt be exercised in the same manner as before the change of practice.

(e) *Service in case of lunacy.*—Should the tenant in possession be a lunatic, service on him will, notwithstanding, be good.⁽⁴⁾

Service in case of bankruptcy.—Service on the official assignee of a bankrupt, and on the messenger in possession under the fiat,⁽⁵⁾ or on one of the assignees who is stated to be tenant in possession,⁽⁶⁾ is good service.

Service on parish.—In ejectment for a house rented by a parish, service on the churchwarden and overseers has been deemed sufficient.⁽⁷⁾

(1) *Doe d. Newman v. Roe*, 2 Dowl. 399.

(2) *Doe d. Schovell v. Roe*, 3 Dowl. 691.

(3) *Doe d. Chippendale v. Roe*, 7 C. B. 125 ; *Doe d. Watson v. Roe*, 5 C. B. 521 ; *Doe d. Mather v. Roe*, 5 Dowl. 652 ; *Doe d. Scott v. Roe*, 6 Bing. N. C. 207.

(4) *Doe d. Gibbard v. Roe*, 3 Scott. N. R. 363.

(5) *Doe d. Baring v. Roe*, 6 Dowl. 456.

(6) *Doe d. Ask v. Roe*, 6 Jur. 238.

(7) *Tupper v. Doe*, Barnes, 181.

Service on holders of chapel.—If the chapel is vested in the minister, the service should be upon him; if he cannot be found, the service may be on the person holding the keys, and by posting a copy of the writ on the chapel door.⁽¹⁾

Service on corporations and companies.—In ejectment against a corporation aggregate, service on the mayor or other head officer, or on the town-clerk, clerk, treasurer or secretary, as the case may be, at his office or on the premises, will, in analogy to the service of a writ of summons, in general suffice.⁽²⁾ If the act incorporating the company authorizes "proceedings" to be served in a particular way, the service may be effected in such way.⁽³⁾ Thus, service on the secretary of a railway company is sufficient service on the company under 8 & 9 Vict. c. 16, s. 125.⁽⁴⁾

Affidavit, &c.—An affidavit of the service of the writ, according to the Common Law Procedure Act, 1852, and a copy thereof, must be filed to entitle the claimant to sign judgment, in case default be made in appearance or defence.⁽⁵⁾

Affidavit of Service of Writ.

In the [Q. B. or "C. P." or "Exch. of P."]

Between A. B. and C. D., [*all the persons named in writ as claimants*] plaintiffs,
and

E. F. and G. H., [*all persons to whom writ directed*] defendants.

I, X. Y., of _____, gentleman, make oath and say—

1. That I did on the _____ day of _____, personally serve E. F., one of the above-named defendants, with a true copy of a writ of ejectment, which appeared to me to have been regularly issued out of and under the seal of this honourable court, at the suit of the above-named plaintiffs, against the above-named defendants, and which said writ bore date the _____ day of _____, A.D. _____, and on which said writ and copy an indorsement was made, pursuant to the statute in such case made and

⁽¹⁾ *Doe d. Scott v. Roe*, 5 Dowl. 405; see also *Dickens v. Roe*, 7 Dowl. 121; *Doe d. Somers v. Roe*, 8 Dowl. 292.

⁽²⁾ *Doe d. Coopers' Company v. Roe*, 8 Dowl. 134; *Doe d. Fisher v. Roe*, 10 M. & W. 21; *Doe v. Roe*, 1 Dowl. 23.

⁽³⁾ *Doe d. Martyns v. Roe*, 6 Scott. 610; 7 Will. 4 & 1 Vict. c. 73, s. 16.

⁽⁴⁾ *Doe d. Burgess v. Roe*, 4 D. & L. 311.

⁽⁵⁾ Reg. Gen. Pr. H. T. 1853, r. 112.

provided, and a true copy of which said writ, with the said indorsement, is hereto annexed, marked (A).

2. That the said C. D., at the time of the said service, was tenant in possession of [part of] the premises described in the said writ.

Sworn, &c.

X. Y.

Rule &c. where personal service not effected.]—If no personal service has been effected, a judge's order or a rule of court must be obtained authorizing the signing of judgment, and a duplicate thereof filed together with the writ.⁽¹⁾

4. *The Appearance.*

(a) *Appearance by defendants.*]—The persons named as defendants in the writ, or either of them, are allowed to appear within the time appointed;⁽²⁾ i. e., in ordinary cases, sixteen days after service of the writ. A tenant, named as defendant, is not bound to appear;⁽³⁾ and the landlord cannot, without his consent, defend in his name.⁽⁴⁾

(b) *Notice to landlord.*]—By the Common Law Procedure Act, 1852, s. 219, "every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his landlord, or his bailiff or receiver, under penalty of forfeiting the value of three years improved or rack-rent of the premises, demised or holden in the possession of such tenant to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount."

The notice may be in the following terms:—

"Take notice that you will receive herewith a copy of a writ of ejectment, which has been served for the recovery of the possession of the messuage, land, and premises at _____, of which I am [or A. B. is] your tenant."

(c) *Appearance by landlord and others not named in the writ.*]—Any other person not named in the writ will, by leave of the court or a judge, be allowed to appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant.⁽⁵⁾ This application should be made within the time limited for the parties

(1) Reg. Gen. Pr. H. T. 1853, r. 112.

(2) C. L. P. Act, 1852, s. 171.

(3) *Right v. Wrong*, Barnes, 173.

(4) *Jones v. Roe*, Barnes, 178.

(5) C. L. P. Act, 1852, s. 172.

named in the writ to appear. To entitle a person to be admitted to defend, he must be in possession. The law allows one who is in by a tenant to come in and defend, not in respect of his having a right, but in respect of his being actually in possession by a tenant who acknowledges him as his landlord.⁽¹⁾ It has been held, on the construction of this statute, that a *prima facie* case of legal possession was sufficient to entitle the grantee of the lessee of a private box in the Opera House to appear to and defend an action of ejectment for the recovery of the theatre; but that a party who had obtained judgment on an ejectment against the lessee, but had not been put in possession, was not so entitled.⁽²⁾ Where a party satisfies the court that he is in possession by himself or his tenant, he is entitled to appear as a matter of right, and the court cannot impose any condition.⁽³⁾ Formerly landlords were, by the 11 Geo. 2, c. 19, s. 13, entitled to be made defendants on application to the court to stay execution against the casual ejector, and on entering into the consent rule, and numerous decisions were given as to the parties entitled to be so admitted to defend. The language of the two acts is nearly similar, and the cases under it will be found collected at 2 Chit. Arch. pp. 941, 942, 8th edit. Any person appearing to defend as landlord in respect of property, whereof he is in possession only by his tenant, must state on his appearance that he appears as landlord.⁽⁴⁾ By Reg. Gen. H. T. 1853, r. 113, "where a person not named in the writ of ejectment has obtained leave of the court or a judge to appear and defend, he shall enter an appearance according to the Common Law Procedure Act, 1852, entitled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff if he sue in person."

Form of Appearance by Landlord.

A. B., plaintiff, } E. F., attorney for C. D., appears for him as
and } landlord [or X. Y. appears in person as land-
C. D., defendant, } lord of the premises] sought to be recovered in
this action.

If the landlord appear in person, his address should be here given.

Entered the day of , A. D. .

(1) Per Maule, J., in *Clarke v. Arden*, 16 C. B. 252.

(2) *Croft v. Lumley*, 4 E. & B. 608.

(3) *Butler v. Meredith*, 24 L. J. 239, Exch.

(4) C. L. P. Act, 1852, s. 173.

Form of Notice of Appearance by Party not named in the Writ.

In the [title of court.]

Between A. B. plaintiff,
and
C. D. defendant.

Take notice that E. F., by leave of the Honourable Mr. Justice [or "Baron "] , on the day of , appeared to this action.

Dated Yours, &c.,

To Mr. J. S., X. Y., attorney for the said E. F.
Plaintiff's attorney [or "agent."]

(d) *Striking out appearance.*—The court or a judge has power to strike out or confine appearances and defences set up by persons not in possession by themselves or their tenants.⁽¹⁾

5. Of Defences.

From the peculiar nature of the proceedings in ejectment, there being no declaration there can be no plea.⁽²⁾ But it is open to a party, as we shall see, to limit his defence to a part only of the premises claimed.

(a) *Defence by landlord.*—Where a landlord is in possession only by his tenant, his defence is, by the Common Law Procedure Act, 1852, s. 173, limited to "any defence which a landlord appearing in ejectment has heretofore been allowed to set up, and no other." He cannot avail himself of every defence which a tenant could have used had he defended.⁽³⁾

(b) *Notice limiting defence.*—Any person appearing to the writ is at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in a notice intituled in the court and cause, and signed by the party appearing or his attorney. An appearance without such notice confining the defence to part, is deemed an appearance to defend for the

⁽¹⁾ C. L. P. Act, 1852, s. 76.

⁽²⁾ *Neave v. Avery*, 16 C. B. 328.

⁽³⁾ See *Clarke v. Arden*, 16 C. B. 227; *Doe v. Birchmore*, 9 A. & E. 662; *Doe v. Alford*, 1 D. & L. 470.

whole.⁽¹⁾ Want of "reasonable certainty" in the description of the part of the property in the notice does not nullify it, but is ground for an application to a judge for better particulars of the land defended.⁽²⁾

Form of Notice.

In the Q. B. ["C. P.," or "Exch. of P."]

Between A. B., plaintiff,
and

C. D., defendant.

Take notice that the above-named defendant limits his defence in this action to a part only of the property mentioned in the writ in this action, and sought to be recovered herein, and that such part consists of _____, [*describing the part with reasonable certainty.*]

Dated, &c.

Yours, X. Y.,

To Mr. J. S.,

Attorney for the said defendant.

Plaintiff's attorney [or "agent."]

(c) *Service of notice.*—The notice confining the defence must be served within four days after appearance upon the attorney whose name is indorsed on the writ, if any; and, if none, it must be filed in the Master's office.⁽³⁾

(d) *Limitation of defence by court.*—The court or judge has power to confine defences set up by persons not in possession by themselves or their tenants.⁽⁴⁾

(e) *Notice confining defence as between joint tenants, tenants in common and co-parceners.*—In case the ejectment is brought by some or one of several persons entitled as joint tenants, tenants in common, or co-parceners, any tenant in common, joint tenant, or co-parcener in possession may, at the time of appearance, or within four days after, give notice in the same form as in the notice of a limited defence, that he or she defends as such, and admits the right of the claimant to an undivided share of the property (stating what share), but denies any actual ouster of him from the property, and may, within the same time, file an affidavit stating with reasonable certainty that he or she is such joint tenant, tenant in common, or co-parcener, and the share of

(1) C. L. P. Act, 1852, s. 174.

(2) *Ibid.* s. 175.

(3) *Ibid.* s. 174.

(4) *Ibid.* s. 176.

such property to which he or she is entitled, and that he or she has not ousted the claimant.

Form of Notice by Tenant in Common.

In the Q. B. ["C. P." or "Exch. of P."]

Between A. B., plaintiff,
and
C. D., defendant.

Take notice that the above-named defendant defends this action as tenant in common with the above-named plaintiff of the property mentioned in the writ herein, and for the recovery of which this action is brought, and that he admits the right of the plaintiff to one undivided moiety or half part, the whole into equal moieties to be divided [*as the case may be*], of and in the said property, but the defendant denies any actual ouster of the plaintiff from the said property.

Dated, &c.

Yours, &c.,

To Mr. J. S.

X. Y., defendant's attorney.

Plaintiff's attorney [or "agent."]

6. Judgment by Default of Appearance, and in case of Limited Defence.

(a) *Filing affidavit, &c. and signing judgment.*—In case no appearance is entered within the time appointed, or if an appearance be entered, but the defence be limited to part only, the plaintiffs are at liberty to sign a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply.⁽¹⁾ Judgment for want of appearance or defence, whether limited or otherwise, cannot, however, be signed without first filing an affidavit of the service of the writ, according to the Common Law Procedure Act, 1852, and a copy thereof; or, where the personal service has not been effected without first obtaining a judge's order, or a rule of court, authorizing the signing such judgment, which rule or order, or a duplicate thereof, must be filed, together with a copy of the writ.⁽²⁾

(b) *Form of judgment for all the land.*—Where the judgment in such case is signed for the whole of the premises claimed, it must be in the following form or to the like effect,

⁽¹⁾ C. L. P. Act, 1852, s. 177.

⁽²⁾ Reg. Gen. H. T. 1853, r. 112.

such form being prescribed by the Common Law Procedure Act, 1852, sched. (A) 14.⁽¹⁾

In the Queen's Bench.

The day of , 18 . [Date of writ.]
Lancashire, } On the day and year above written, a writ of our Lady
 to wit. } the Queen issued forth of this court in these words, that
 is to say,

VICTORIA, by the grace of God, [*here copy the writ*] and no appearance has been entered or defence made to the said writ. Therefore it is considered that the said [*here insert the names of the person in whom title is alleged in the writ*] do recover possession of the land in the said writ mentioned, with the appurtenances.

(c) *Form of judgment for part of the land.*—Where the defence is limited to part only, and judgment is signed as to other part, the following is the form prescribed by the Common Law Procedure Act, 1852, sched. (A) 15.⁽²⁾

In the Queen's Bench.

On the day of , A.D. 18 .
Lancashire, } On the day and year above written, a writ of our Lady
 to wit. } the Queen issued forth of this court, in these words, that
 is to say,

VICTORIA, by the grace of God, [*here copy the writ*] and C. D. has, on the day of , appeared by , his attorney, [*or in person*] to the said writ, and has defended for a part of the land in the writ mentioned; that is to say, [*here state the part*] and no appearance has been entered, or defence made to the said writ, except as to the said part. Therefore it is considered that the said A. B. [*the claimant*] do recover possession of the land in the said writ mentioned, except the said part, with the appurtenances, and that he have execution thereof forthwith; and as to the rest let a jury come, &c.

(d) *Setting aside judgment.*—Notwithstanding that the judgment was regularly signed, the court or a judge, under the old practice, let in the tenant or other person claiming title to defend, upon an affidavit of merits, or that he believed there was a good defence, if such application were made before writ of possession executed; ⁽³⁾ but not after execution, unless a strong case of surprise was made out.⁽⁴⁾ If irregular it was set aside on the application of the landlord

⁽¹⁾ C. L. P. Act, 1852, s. 177.

⁽²⁾ *Ibid.*

⁽³⁾ *Doe d. Mallarkey v. Roe*, 11 A. & E. 333.

⁽⁴⁾ *Mason v. Hodgson*, Barnes, 250; *Doe d. Ingram v. Roe*, 11 Price, 807; 2 Chit. Arch. 935 n. (c) 8th edit.

or of the tenant, provided the latter had appeared.⁽¹⁾ The practice, it would appear, is still the same.

7. *Incidental Proceedings by either Party.*

(a) *Particulars of breaches of covenant.*]—Where the ejectment is for a forfeiture by breaches of covenant the defendant may, by application to a judge, obtain an order for particulars of the covenants and breaches.⁽²⁾

(b) *Security for costs.*]—Where the plaintiff is an infant,⁽³⁾ or resides abroad,⁽⁴⁾ he may be required to give security for costs. And by the Common Law Procedure Act, 1854, s. 93, “if any person shall bring an action of ejectment after a prior action of ejectment for the same premises has been or shall have been unsuccessfully brought by such person, or by any person through or under whom he claims against the same defendant, or against any person through or under whom he defends, the court or a judge may, if they or he think fit, on the application of the defendant, at any time after such defendant has appeared to the writ, order that the plaintiff shall give to the defendant security for the payment of the defendant's costs, and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action has been or shall have been disposed of by discontinuance or by nonsuit, or by judgment for the defendant.” And, if the costs of the former action are unpaid, the court will, it appears, stay the proceedings in the second action until the plaintiff pays them.⁽⁵⁾

(c) *Discontinuance by sole claimant.*]—The claimant in ejectment is at liberty, at any time, to discontinue the action as to one or more of the defendants, by giving to the defendant or his attorney a notice, headed in the court and cause, and signed by the claimant or his attorney, stating that he discontinues such action, and thereupon the defendant, to whom such notice is given, is entitled

⁽¹⁾ *Doe d. Vernon v. Roe*, 7 A. & E. 14; *Doe d. Williamson v. Roe*, 15 L. J., Q. B. 39.

⁽²⁾ *Doe d. Child v. Roe*, 1 E. & B. 279.

⁽³⁾ *Throgmorton v. Miller*, 2 Str. 932; *Doe d. Roberts v. Roberts*, 6 Dowl. 556.

⁽⁴⁾ *Doe d. Hudson v. Jameson*, 4 M. & Ry. 570.

⁽⁵⁾ *Doe d. Brayne v. Bather*, 12 Q. B. 941.

to and may forthwith sign judgment for costs in the form contained in the schedule (A) to the Common Law Procedure Act, 1852, annexed, marked No. 18, or to the like effect.⁽¹⁾

Form of judgment.—The following is the form of judgment to be signed in such case:—

In the Q. B.

On the day of , A. D. 18 . [*Date of writ.*]

Lancashire, } On the day and year above written, a writ of our
to wit. } Lady the Queen issued forth of this court in these
words, that is to say,

VICTORIA, by the grace of God [*here copy the writ*], and C. D. has, on the day of , appeared by , his attorney [*or "in person"*], to the said writ, and A. B. has discontinued the action. Therefore it is considered that the said C. D. be acquitted, and that he recover against the said A. B. £ , for his costs of defence.

Discontinuance by one of several claimants.—In case one of several claimants is desirous to discontinue, he may apply to the court or a judge to have his name struck out of the proceedings, and an order may be made thereupon, upon such terms as to the court or judge may seem fit, and the action may thereupon proceed at the suit of the other claimants.⁽²⁾

(d) *Confession by sole defendant or all the defendants.*—By the Common Law Procedure Act, 1852, s. 203, it is provided, that "A sole defendant or all the defendants in ejectment shall be at liberty to confess the action as to the whole or part of the property, by giving to such claimant a notice headed in the court and cause, and signed by the defendant or defendants, such signature to be attested by his or their attorney: and thereupon the claimant shall be entitled to and may forthwith sign judgment, and issue execution for the recovery of possession and costs in the form contained in schedule (A) to this act annexed, marked No. 20, or to the like effect."

⁽¹⁾ C. L. P. Act, 1852, s. 200.

⁽²⁾ *Ibid* s. 201.

Notice of Confession.

In the Q. B. ["C. P.," or "Exch. of P."]

Between A. B., plaintiff,
and

C. D., defendant.

Take notice that I confess this action as to the whole, of the property sought to be recovered herein [or as to part of the property sought to be recovered herein], consisting of [*describing the part it is desired to confess.*]

Dated, &c.

Signed, C. D.

Witness, X. Y., the defendant's attorney in the said action.

Form of judgment.—The following is the form of the judgment that may be signed in such case :—

In the Q. B.

The day of , A. D. 18 . [*Date of writ*].

Lancashire, } On the day and year above written, a writ of our
to wit. } Lady the Queen issued forth of this court in these
words, that is to say,

VICTORIA, by the grace of God [*here copy the writ*], and C. D. has, on the day of appeared by , his attorney [*or "in person"*], to the said writ, and the said C. D. has confessed the said action [*or, has confessed the said action as to part of the said land, that is to say here state the part*]. Therefore it is considered that the said A. B. do recover possession of the land in the said writ mentioned [*or of the said part of the said land*], with the appurtenances, and £ for costs.

Confession by one of several defendants.—In case one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, shall be desirous of confessing the claimant's title to such portion, he may give a like notice to the claimant; and thereupon the claimant shall be entitled to and may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue.⁽¹⁾ And in case one of several defendants in ejectment, who defends separately in respect of property for which other defendants also defend, is desirous of confessing the claimant's title, he may give a like notice thereof, and

⁽¹⁾ C. L. P. Act, 1852, s. 204.

thereupon the claimant is entitled to and may sign judgment against such defendant for the costs occasioned by his defence, and may proceed in the action against the other defendants to judgment and execution.⁽¹⁾

(e) *Staying proceedings where ejectment by mortgagee.*—It is by the Common Law Procedure Act, 1852, s. 219, provided, that “where an action of ejectment shall be brought by any mortgagee, his heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of her Majesty’s courts of equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments, if the person having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become defendant in such action, shall, at any time pending such action, pay unto such mortgagee, or, in case of his refusal, shall bring into court where such action shall be pending, all the principal moneys and interest due on such mortgage, and also all such costs as have been expended in any suit at law or in equity upon such mortgage (such money, for principal, interest, and costs, to be ascertained and computed by the court where such action is or shall be pending, or by the proper officer by such court to be appointed for that purpose), the moneys so paid to such mortgagee, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the court shall and may discharge every such mortgagor or defendant of and from the same accordingly; and shall and may, by rule of the same court, compel such mortgagee, at the costs and charges of such mortgagor, to assign, surrender, or reconvey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee has therein, and deliver up all deeds, evidences, and writings in his custody, relating to the title of such mortgaged lands, tenements, and hereditaments unto such mortgagor who shall have paid or brought such moneys into the court, his heirs, executors, or administrators, or to such person or persons as he or they shall, for that purpose, nominate or appoint.” By the 220th section it is enacted, that “nothing herein contained shall extend to any case

(1) C. L. P. Act, 1852, s. 205.

where the person against whom the redemption is or shall be prayed, shall (by writing under his hand, or the hand of his attorney, agent, or solicitor, to be delivered before the money shall be brought into such court of law, to the attorney or solicitor for the other side) insist either that the party praying a redemption has not a right to redeem, or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side; or to any case where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted or questioned by or between different defendants in the same cause or suit; or shall be any prejudice to any subsequent mortgage or subsequent incumbrance, any thing herein contained to the contrary thereof in anywise notwithstanding." The above sections are substantially a re-enactment of the 7 Geo. 2, c. 20, s. 1, and the practitioner is referred to the cases upon the construction of that enactment.⁽¹⁾ The formal part of the rule may be as follows: "Show cause why, upon the defendant bringing into this court all the principal moneys and interest due to the plaintiff upon his mortgage upon the premises, for the recovery of possession of which this action is brought, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained, computed and taxed by one of the Masters of this court), the money brought into this court should not be deemed and taken to be in full satisfaction and discharge of such mortgage, and, upon payment thereof to the plaintiff, why all proceedings in this action should not be stayed; and why the mortgaged premises, and the plaintiff's estate and interest therein should not be assigned, surrendered, and reconveyed, and why all deeds, evidences, and writings relating to the title of such mortgaged premises, and in the custody or power of the plaintiff, should not be delivered up to the defendant or to such person or persons as he shall, for that purpose, nominate and appoint."

(f) *Proceedings where party dies before judgment—Action does not abate.*—By the Common Law Procedure

⁽¹⁾ *Goodtitle v. Bishop*, 1 Y. & J. 344; *Doe d. Tubb v. Roe*, 4 Taunt. 887; *Hewson v. Hewson*, 4 Ves. 106; *Archer v. Snatt*, 2 Str. 1107.

Act, 1852, s. 190, it is enacted, that "the death of a claimant or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned."

Where right of deceased claimant survives to other claimants.]—"In case the right of the deceased claimant shall survive to another claimant, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant, and if such a suggestion shall be made before the trial, then the claimant shall have a verdict and recover such judgment as aforesaid, upon its appearing that he was entitled to bring the action, either separately or jointly with the deceased claimant."⁽¹⁾

Where right of deceased claimant does not survive to other claimants.]—"In case of the death before trial of one of several claimants, whose right does not survive to another or others of the claimants, where the legal representative of the deceased claimant shall not become a party to the suit in the manner hereinafter mentioned, a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the action may proceed at the suit of the surviving claimant, for such share of the property as he is entitled unto, and costs."⁽²⁾ "In case of the death of a sole claimant, or before trial of one of several claimants, whose right does not survive to another or others of the claimants, the legal representative of such claimant may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed."⁽³⁾

Form of Suggestion of Death of sole Claimant.

And now, on the day of , A. D. , it is suggested and manifestly appears to the court here, that since the issuing of the said writ the said G. M. died, and that C. W. is the legal representative of the said G. M., and the said C. W., as such, claims to be entitled to the possession of the land and premises in the said writ mentioned, and to eject all other persons therefrom. Therefore let a jury come, &c.

Where one of several defendants dies.]—"In case of the

⁽¹⁾ C. L. P. Act, 1852, s. 191.

⁽²⁾ *Ibid.*

⁽³⁾ *Ibid.* s. 194.

death, before or after judgment, of one of several defendants in ejectment, who defend jointly, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the action may proceed against the surviving defendant to judgment and execution."⁽¹⁾ "In case of the death before trial of one of several defendants in ejectment, who defends separately for a portion of the property for which the other defendant or defendants do not defend, the same proceedings may be taken as to such portion as in the case of the death of a sole defendant, or the claimant may proceed against the surviving defendants in respect of the portion of the property for which they defend."⁽²⁾ "In case of the death before trial of one of several defendants in ejectment, who defends separately in respect of property for which surviving defendants also defend, it shall be lawful for the court or a judge, at any time before the trial, to allow the person at the time of the death in possession of the property, or the legal representative of the deceased defendant, to appear and defend, on such terms as may appear reasonable and just, upon the application of such person or representative; and if no such representation be made, or leave granted, the claimant, suggesting the death in manner aforesaid, may proceed against the surviving defendant or defendants to judgment and execution."⁽³⁾

Where sole defendant or all the defendants die.]—"In case of the death of a sole defendant, or of all the defendants, in ejectment, before trial, a suggestion may be made of the death, which suggestion shall not be traversable, but only be subject to be set aside if untrue, and the claimants shall be entitled to judgment for recovery of possession of the property, unless some other person shall appear and defend within the time to be appointed for that purpose, by the order of the court or a judge, to be made upon the application of the claimants; and it shall be lawful for the court or a judge, upon such suggestion being made, and upon such application as aforesaid, to order that the claimants shall be at liberty to sign judgment within such time as the court or judge may think fit, unless the person then in possession, by himself or his tenant, or the legal representative of the

⁽¹⁾ C. L. P. Act, 1852, s. 195.

⁽²⁾ *Ibid.* s. 198.

⁽³⁾ *Ibid.* s. 199.

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deceased defendant, shall, within such time, appear and defend the action; and such order may be served in the same manner as the writ. And in case such person shall appear and defend, the same proceedings may be taken against such new defendant as if he had originally appeared and defended the action; and if no appearance be entered and defence made, then the claimant shall be at liberty to sign judgment pursuant to the order.⁽¹⁾

8. *The Issue.*

In case an appearance is entered, an issue may at once be made up, without any pleadings, by the claimants or their attorney, setting forth the writ and stating the fact of the appearance, with its date and the notice limiting the defence, if any, of each of the persons appearing, so that it may appear for what defence is made, and directing the sheriff to summon a jury.⁽²⁾ Where the ejectment is between joint tenants, tenants in common, or co-parceners, and the defendant has given a notice under section 188 of the Common Law Procedure Act, 1852, it must be entered in the issue in the same manner as the notice limiting the defence.⁽³⁾

(a) *Form of issue where defence is made for all the lands.*—The following form is prescribed by the Common Law Procedure Act, 1852, sched. (A) 16, and is to be used where the defence is to the whole of the lands claimed.

In the Queen's Bench.

On the day of , A.D. 18 .
Cumberland, } On the day and year above written a writ of our Lady
 } *to wit.* } the Queen issued forth of this court in these words:
 that is to say,

VICTORIA, by the grace of God [*here copy the writ*] and C. D. has, on the day of , appeared by , his attorney, [or in person] to the said writ, and defended for the whole of the land therein mentioned. Therefore let a jury come, &c.

(b) *Form of issue where defence is made for part only.*—The following form in such case is contained in the Common Law Procedure Act, 1852, sched. (A) 17.

(1) C. L. P. Act, 1852, s. 196.

(2) *Ibid.* s. 178.

(3) *Ibid.* s. 188.

Afterwards, on the day of A.D. , before , and , justices of our Lady the Queen, assigned to take the assizes in and for the within county, come the parties within mentioned ; and a jury of the said county being sworn to try the matters in question between the said parties, upon their oath say, that A. B. [*the claimant*] within mentioned, on the day of , A.D. , was and still is entitled to the possession of the land within mentioned, as in the writ alleged. Therefore, &c.

Annexing particulars of claim and defence.—The particulars of the claim and defence, if any, or copies thereof, must be annexed to the record by the claimant.⁽¹⁾

(c) *Special case.*—It may be convenient to state here that, instead of going to trial, by consent of the parties and by leave of a judge, a special case may be stated according to the practice before the Common Law Procedure Act, 1852.⁽²⁾

9. *The Trial.*

(a) *Within what time.*—The claimant may, if no special case be agreed to, proceed to trial upon the issue in the same manner as in other actions,⁽³⁾ except where the action is brought by a landlord against his tenant in a case within the Common Law Procedure Act, 1852, s. 217, when under that section “it shall be sufficient to give at least six clear days’ notice of trial to the defendant, before the commission day of the assizes at which such ejectment is intended to be tried; and any defendant in such action may, at any time before the trial thereof, apply to a judge by summons to stay or set aside the proceedings, or to postpone the trial until the next assizes.”

(b) *Proceedings where claimant neglects to try.*—If after appearance entered the claimant, without going to trial, allow the time allowed for going to trial by the practice of the court in ordinary cases after issue joined to elapse, the defendant in ejectment may give twenty days’ notice to the claimant to proceed to trial at the sittings or assizes next after the expiration of the notice; and if the claimant afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance

(1) C. L. P. Act, 1852, s. 180.

(2) *Ibid.* s. 179.

(3) *Ibid.* s. 180.

of the said notice given by the defendant, and the time for going to trial is not extended by the court or a judge, the defendant may sign judgment and recover the costs of defence.⁽¹⁾ This course must be pursued in order to take advantage of the plaintiff's default, as there is now no judgment of nonsuit in such case.⁽²⁾

Notice to Proceed to Trial.

In the Q. B. ["C. P." or "Exch. of P."]

Between A. B., plaintiff,
and
C. D. defendant.

Take notice, the above-named defendant hereby requires the above-named plaintiff to proceed to the trial of this cause at the sittings to be held for the county of Middlesex [or "City of London," or "at the assizes to be held for the county of _____,"] next after the expiration of twenty days from the service of this notice. Yours, &c.

Dated, _____ X. Y., defendant's attorney.

To the above-named plaintiff, and to

Mr. J. S., his attorney, [or "agent."]

(c) *Form of judgment where claimant makes default in proceeding to trial.*—The form of judgment in such case is prescribed by the Common Law Procedure Act, 1852, sched. (A) 19, and is as follows:—

In the Queen's Bench.

The _____ day of _____, A.D. 18 ____ . [*Date of writ.*]
Lancashire, } On the day and year above written a writ of our Lady
to wit. } the Queen issued forth of this court in these words; that
is to say,

VICTORIA, by the grace of God, [*here copy the writ*] and C. D. has, on the _____ day of _____, appeared by _____, his attorney, [or in person] to the said writ, and A. B. has failed to proceed to trial, although duly required so to do. Therefore it is considered that the said C. D. be acquitted, and that he recover against the said A. B. £ _____ for his costs of defence.

(d) *Place of trial.*—The court or a judge may, on the application of either party, order that the trial shall take place in any county or place other than that in which the

⁽¹⁾ C. L. P. Act, 1852, s. 202.

⁽²⁾ *Doe d. Leigh v. Holt*, 8 Exch. 130.

venue is laid ; and such order being suggested on the record, the trial may be had accordingly.⁽¹⁾

(e) *Non-appearance of either party at trial.*—If the defendant appears, and the claimant does not appear at the trial, the claimant will be nonsuited ; ⁽²⁾ and where a plaintiff in ejectment is nonsuited at the trial, the defendant is entitled to judgment for his costs of suit.⁽³⁾ If the plaintiff in ejectment appears at the trial, and the defendant does not appear, the defendant will be taken to have admitted the plaintiff's title, and the verdict will be entered for the plaintiff, without producing any evidence, and the plaintiff will have judgment for his costs of suit as in other cases.⁽⁴⁾

(f) *Questions tried.*—It is by the Common Law Procedure Act, 1852, s. 180, provided, that “ the question at the trial shall, except in the cases hereafter mentioned, be, whether the statement in the writ of the title of the claimants is true or false, and, if true, then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question.” If the action be between persons entitled as joint tenants, tenants in common, or co-parceners, and the defendant has given the notice and filed the affidavit required by the Common Law Procedure Act, 1852, s. 188, admitting the right of the claimant to a share of and denying any actual ouster of him from the property, the additional question of whether an actual ouster has taken place is also tried.⁽⁵⁾ Where the legal representative of a deceased claimant has before trial entered a suggestion of the death, and that he is such legal representative, the truth of the suggestion will be tried together with the title of the deceased claimant, and such judgment follows upon the verdict in favour of or against the person making such suggestion, as is provided with reference to a judgment for or against such claimant.⁽⁶⁾

(g) *Verdict.*—The claimant may recover any part of the lands claimed in the writ, provided he make out his title to

(1) C. L. P. Act, 1852, s. 182.

(2) *Ibid.* s. 183.

(3) Reg. Gen. (Pl.) H. T. 1853, r. 29.

(4) Reg. Gen. (Pr.) H. T. 1853, r. 114 ; see also, to the same effect, C. L. P. Act, 1852, s. 183 ; Reg. Gen. (Pl.) H. T. 1853, r. 30.

(5) C. L. P. Act, 1852, s. 188.

(6) *Ibid.* s. 194.

a specific portion.⁽¹⁾ It is provided by the Common Law Procedure Act, 1852, s. 181, that, "in case the title of the claimant shall appear to have existed as alleged in the writ, and at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall, notwithstanding, be entitled to a verdict according to the fact that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit." And it was so held before the statute.⁽²⁾ Where an issue is raised under section 188 of the Common Law Procedure Act, 1852, as to whether there has been an actual ouster, "if it shall be found that the defendant is joint tenant, tenant in common, or co-parcener with the claimant, then the question whether an actual ouster has taken place shall be tried, and unless such actual ouster shall be proved, the defendant shall be entitled to judgment and costs; but if it shall be found either that the claimant is not such joint tenant, tenant in common, or co-parcener, or that an actual ouster has taken place, then the claimant shall be entitled to such judgment for the recovery of possession and costs."⁽³⁾ The jury may find a special verdict or either party may tender a bill of exceptions.⁽⁴⁾ If the verdict be special, it should be made to appear that the claimant had a right of entry when the ejectment was commenced.⁽⁵⁾ The jury may give damages for the detention of the property, but they are usually nominal, being in general afterwards recovered in an action for the mesne profits, save in the case following.

(h) *Mesne profits.*]—Wherever it appears on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant or his attorney has been served with due notice of trial, the judge before whom the cause is tried will, whether the defendant appears upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the writ of ejectment, to go into evidence of the mesne profits thereof, which shall have accrued from the day of the expiration or determination of the tenant's interest

(1) *Doe d. Hellyer v. King*, 6 Exch. 791.

(2) *Doe d. Butt v. Rous*, 1 E. & B. 419.

(3) C. L. P. Act, 1852, s. 189.

(4) *Ibid.* s. 184.

(5) *Taylor v. Horde*, 1 Burr. 60.

in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord has judgment within the usual time, not only for the recovery of possession and costs, but also for the mesne profits found by the jury. This does not bar the landlord from bringing an action for the mesne profits which may subsequently accrue.⁽¹⁾ And the landlord is entitled to go into evidence of and recover the mesne profits, although they are not claimed in the writ.⁽²⁾

(i) *Form of verdict.*—The following form of the entry of a verdict is contained in the Common Law Procedure Act, 1852, sched. (A) 17, and is to be used with such modifications as may be necessary to meet the facts.

Afterwards, on the day of , A.D. , before , and , justices of our Lady the Queen, assigned to take the assizes in and for the within county, come the parties within mentioned, and a jury of the said county being sworn to try the matters in question between the said parties, upon their oath say that A. B., (*the claimant*) within mentioned, on the day of , A.D. , was, and still is, entitled to the possession of the land within mentioned, as in the writ alleged. Therefore, &c.

If there is also a recovery of mesne profits, the following addition to the entry as above is suggested.

[*The same as above, to words, "as in the writ alleged."*] And this action being brought by the said A. B., as landlord, against the said C. D., as tenant of the said land, and for, by reason and on account of his, the said C. D.'s, interest in the said land, as such tenant as aforesaid having expired [*or "determined"*] and it appearing upon the trial of this cause that the attorney for the said C. D. in this cause hath been duly served with due notice of the trial of this cause, the jury aforesaid, upon their oath aforesaid, under the Act of Parliament in that behalf, find and assess at the sum of £ , the damages of the plaintiff to be paid by the defendant to the plaintiff for the mesne profits of the said land, which have accrued from the day of , being

⁽¹⁾ C. L. P. Act, 1852, s. 214.

⁽²⁾ *Smith v. Tett*, 9 Exch. 307.

the day of the said expiration [or "determination"] of the said C. D.'s interest in the said land, as such tenant as aforesaid, down to the time of the verdict given in this cause, [or "to the day of . A.D. .] Therefore, &c.

Judgment thereon.

Therefore it is considered that the said A. B. do recover against the said C. D. the possession of the said land, and also the said sum of £ , so assessed and found due as aforesaid, as the damages of the plaintiff for the said mesne profits of the said land, which have accrued as aforesaid, and also £ , for the said A. B.'s costs of suit.

(k) *Costs.*—The prevailing party is entitled to costs in nearly the same cases as in personal actions. The plaintiff is entitled to a verdict and judgment for costs, if he was entitled to the property at the time of bringing the action, although his title may have expired before the time of trial.⁽¹⁾ The defendant is entitled to judgment for his costs, if the plaintiff be nonsuited at the trial.⁽²⁾ If there be several defendants, and the plaintiff have a verdict against all, each of them is liable for the entire costs; ⁽³⁾ and if they succeed, the plaintiff may pay the costs to which of them he pleases.⁽⁴⁾ Where a plaintiff neglects, after notice, to proceed to trial, the defendant may sign judgment and recover the costs of defence.⁽⁵⁾ If the claimant has judgment, the defendant not appearing at the trial, he is entitled to judgment for his costs of suit as in other cases.⁽⁶⁾ Either the plaintiff or defendant recovering judgment may have execution for the costs, and in the case of a plaintiff he may have separate writs for the recovery of possession and costs, or both may be included in one.⁽⁷⁾ Where, however, judgment is signed for default of appearance to the writ under section 187 of the Common Law Procedure Act, 1852, no costs are given, but they may be recovered as damages in an action for the mesne profits. Since the Common Law Procedure Act, as before, the court has jurisdiction to order by rule the parties really conducting the defence to pay the costs of the plaintiff,

⁽¹⁾ C. L. P. Act, 1852, s. 181.

⁽²⁾ Reg. Gen. (Pl.) H. T. 1853, r. 29.

⁽³⁾ Bull. N. P. 335.

⁽⁴⁾ *Jordan v. Harper*, 1 Str. 516.

⁽⁵⁾ C. L. P. Act, 1852, s. 202.

⁽⁶⁾ Reg. Gen. (Pr.) H. T. 1853, r. 114.

⁽⁷⁾ C. L. P. Act, 1852, ss. 185 to 187.

though they be strangers to the record, and claim no interest in the property.⁽¹⁾

(1) *Proceedings where party dies after verdict.*—In case one of several defendants who defend jointly dies after judgment, a suggestion may be made of the death, which is not traversable, but only subject to be set aside if untrue, and execution may issue against the surviving defendant.⁽²⁾ And in case of the death of a sole defendant, or of all the defendants, after verdict, the claimants are, nevertheless, entitled to judgment, as if no such death had taken place, and to proceed to execution for recovery of possession without suggestion or revivor, and to proceed for the recovery of the costs in like manner as upon any other judgment for money against the legal representatives of the deceased defendant or defendants.⁽³⁾ If a sole claimant die, and the suggestion of his death be made after trial and before execution executed by delivery of possession thereupon, and such suggestion is denied by the defendant within eight days after notice thereof, or such further time as the court or a judge may allow, such suggestion is tried, and if upon the trial thereof a verdict pass for the person making such suggestion, he is entitled to judgment for the recovery of possession, and for the costs of, and occasioned by, such suggestion; and in case of a verdict for the defendant such defendant is entitled to judgment for costs.⁽⁴⁾ But in case of a verdict for two or more claimants, if one of such claimants die before execution executed, the other claimant may, whether the legal right to the property shall survive or not, suggest the death and proceed to judgment and execution for recovery of possession of the entirety of the property, and the costs. This does not affect the right of the legal representative of the deceased claimant, or the liability of the surviving claimant to such legal representative, and the entry and possession of such surviving claimant under such execution is considered as an entry and possession on behalf of such legal representative, in respect of the share of the property to which he is entitled as such representative, and the court may direct possession to be delivered accordingly.⁽⁵⁾

⁽¹⁾ *Hutchinson v. Greenwood*, 4 E. & B. 324; *Austen v. Edwards*, 16 C. B. 212.

⁽²⁾ C. L. P. Act, 1852, s. 195.

⁽³⁾ *Ibid.* s. 197.

⁽⁴⁾ *Ibid.* s. 194.

⁽⁵⁾ *Ibid.* s. 193.

10. *Judgment and Execution.*

The effect of a judgment in an action of ejectment under the Common Law Procedure Act, 1852, is the same as that of a judgment in the action of ejectment before the act.⁽¹⁾

(a) *Judgment, how signed.*—It is not necessary before issuing execution upon any judgment, under the authority of the new Procedure Act, to enter the proceedings upon any roll, but an *incipitur* thereof must be made upon paper, shortly describing the nature of the judgment according to the old practice, and judgment may thereupon be signed, and costs taxed, and execution issued, according to the practice before the act; but the proceedings may be entered on the roll whenever the same may become necessary for the purpose of evidence, or of bringing error or the like.⁽²⁾

Within what time judgment may be signed and execution issue.—“Upon a finding for the claimant, judgment may be signed and execution issue for the recovery of the possession of the property, or such part thereof as the jury shall find the claimant entitled to, and for costs, within such time, not exceeding the fifth day after the verdict, as the court or judge before whom the cause is tried shall order, and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen.”⁽³⁾ “Upon a finding for the defendants, or any of them, judgment may be signed, and execution issue for costs against the claimants named in the writ, within such time, not exceeding the fifth day in term after the verdict, as the court or judge before whom the cause is tried shall order; and if no such order be made, then on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen.”⁽⁴⁾

(b) *What writs may issue.*—Upon any judgment in ejectment for recovery of possession and costs, there may be either one writ or separate writs of execution for the recovery of possession and for the costs, at the election of the claimant.⁽⁵⁾

(1) C. L. P. Act, 1852, s. 207.

(2) *Ibid.* s. 206.

(3) *Ibid.* s. 185.

(4) *Ibid.* s. 186.

(5) *Ibid.* s. 187.

(c) *Teste and return of writ of habere facias possessionem.*]—The writ of *habere facias possessionem* is within the 3 & 4 Will. 4, c. 67, s. 2, and may therefore be made returnable immediately after the execution thereof.⁽¹⁾ As to the teste and indorsement of the writ, and the practice generally on issuing it, the practitioner is referred, *ante*, title, “Execution on judgments,” where the subject is treated at length.

(d) *How executed.*]—In executing a *habere facias possessionem*, the outer doors may, if necessary, be broken open,⁽²⁾ and after obtaining possession, persons, goods, &c., may be removed.⁽³⁾ If there be several tenements in the possession of several tenants, the officer must give possession of each separately.⁽⁴⁾

(e) *Forms of writs of execution.*]—The following forms of writs of execution upon judgments in ejectment are contained in the schedule appended to the Reg. Gen. H. T. 1852, where they are numbered respectively 23, 24, and 25, and are to be used with such alterations as the circumstances of the case may render necessary.

Writ of Habere Facias in Ejectment upon a Judgment by Default.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith: To the sheriff of greeting. Whereas A. B., lately in our Court of Q. B. [or “C. P.” or “Exch. of P.” as the case may be], by the judgment of the same court recovered possession of [here describe the property as in the writ of ejectment, or if part only of the land has been recovered, describe such part as in the judgment], with the appurtenances in your bailiwick. Therefore we command you that [if sued out of the Court of Exchequer, say:—“Therefore we command you that you omit not, by reason of any liberty of your county, but that you enter the same and”] without delay you cause the said A. B. to have possession of the said land and premises with the appurtenances. And in what manner you have executed this our writ make appear to us [or in the Common Pleas, “to our justices,” or in the Exchequer, “to the Barons of our Exchequer,” as the case may be], at Westminster, immediately on the execution hereof, and have you there then this writ.

Witness, &c.

(1) *Doe d. Hudson v. Roe*, 21 L. J., Q. B. 369.

(2) *Semayne's case*, 5 Co. R. 92.

(3) *Upton and Wells' case*, 1 Leon. 145.

(4) *Fenn d. Blanchard v. Wood*, 1 B. & P. 573; *Connor v. West*, 5 Burr. 2673.

Writ of Habere Facias and Fieri Facias for Costs upon a Judgment for Plaintiff in Ejectment where Defendant has appeared.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith: To the sheriff of greeting. Whereas A. B., lately in our Court of Q. B. [or "C. P." or "Exch. of P." as the case may be], recovered possession of [here describe the property as in the writ of ejectment, or if part only of the land has been recovered, describe such part as in the judgment], with the appurtenances in your bailiwick, in an action of ejectment at the suit of the said A. B. against C. D. Therefore we command you, that without delay you cause the said A. B. to have possession of the said land and premises, with the appurtenances; and we also command you that [if sued out of the Court of Exchequer say, "and we also command you, that you omit not, by reason of any liberty of your county, but that you enter the same and that,"] of the goods and chattels of the said C. D., in your bailiwick you cause to be made £ , which the said A. B., lately in our said court, recovered against the said C. D. for the said A. B.'s costs of the said suit, whereof the said C. D. is convicted, together with interest on the said sum, at the rate of four pounds per centum per annum, from the day of , in the year of our Lord , on which day the judgment aforesaid was entered up, and have that money and interest aforesaid in our said court immediately after the execution hereof, to be rendered to the said A. B., and that you do all things as by the statute passed in the second year of our reign you are authorized and required to do in that behalf. And in what manner you shall have executed this our writ make appear to us [or in the Common Pleas, "before our justices," or in the Exchequer, "before the Barons of our Exchequer," as the case may be], at Westminster, immediately after the execution hereof, and have you there then this writ. Witness, &c.

Writ of Fieri Facias for Costs on a Judgment for Plaintiff in Ejectment where Defendant has appeared.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith: To the sheriff of greeting. We command you that [if sued out of the Court of Exchequer, "We command you that you omit not, by reason of any liberty of your county, but that you enter the same and"] of the goods and chattels of C. D., in your bailiwick, you cause to be made £ , which A. B., lately in our Court of Q. B. [or "C. P." or "Exch. of Pleas," as the case may be], recovered against him, for the said A. B.'s costs of suit in an action of ejectment, brought by the said A. B. against the said C. D. in that court, whereof the said C. D. is convicted, together with interest upon the said sum, at the rate of four pounds per centum per annum, from the day of , in the

year of our Lord , on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before us [or in the Common Pleas, "before our justices," or in the Exchequer, "before the barons of our Exchequer," as the case may be] at Westminster, immediately after the execution hereof, to be rendered to the said A. B., and that you do all things as by the statute passed in the second year of our reign you are authorized and required to do in that behalf. And in what manner you shall have executed this our writ make appear to us [or in the Common Pleas, "to our justices," or in the Exchequer, "to the barons of our Exchequer," as the case may be] at Westminster, immediately after the execution hereof, and have you there then this writ. Witness, &c.

11. Error.

In what cases may be brought.]—Error may be brought in like manner as in other actions, upon any judgment in ejectment, after a special verdict found by the jury, or a bill of exceptions, or, by consent, after a special case stated.⁽¹⁾ As to the practice, see the subject treated, *ante*, title, "Proceedings in Error," p. 525.

II. PROCEEDINGS WHERE EJECTMENT IS BY LANDLORD FOR FORFEITURE BY NON-PAYMENT OF RENT, WHERE THERE IS NO SUFFICIENT DISTRESS ON THE PREMISES.

- | | |
|------------------------------------|--------------------------------------|
| (a) When proceedings may be taken. | (d) Judgment, &c. |
| (b) Service or affixing of writ. | (e) Proceedings by tenant in equity. |
| (c) Payment of arrears. | (f) Costs. |

(a) *When proceedings may be taken.*]—Where the ejectment is by a landlord, and is founded on a forfeiture by non-payment of rent, if there be a sufficient distress upon the premises the landlord, in order to avail himself of the forfeiture, must, in the first place, formally demand the rent,⁽²⁾ unless indeed there be an express agreement dispensing with such demand,⁽³⁾ and he must then proceed as in an ordinary case of ejectment. But if there be no sufficient distress, he may avail himself of the more satisfactory remedy provided in such case, and in which no demand of rent need be made.

⁽¹⁾ C. L. P. Act, 1852, s. 208.

⁽²⁾ *Doe d. West v. Davis*, 7 East, 363.

⁽³⁾ *Doe d. Harris v. Masters*, 2 B. & C. 490.

[C. L.—vol. ii.]

(b) *Service or affixing of writ.*—By the Common Law Procedure Act, 1852, s. 210, it is provided, that “In all cases between landlord and tenant, as often as it shall happen that one half-year’s rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right, by law, to re-enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage; or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, and hereditaments comprised in such writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such writ in ejectment shall stand in the place and stead of a demand and re-entry.”⁽¹⁾ The rent should be calculated to the last rent-day.⁽²⁾ And proceedings may be taken under the section, though the arrears of rent much exceed one half-year, notwithstanding there is a sufficient distress to countervail one half-year’s rent, if it be insufficient to countervail the arrears then due.⁽³⁾

(c) *Payment of arrears of rent.*—If the tenant or his assignee do or shall, at any time before the trial of such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued.⁽⁴⁾ It has been held, upon the construction of the same words, in the 4 Geo. 2, c. 28, s. 4, that a sub-lessee,⁽⁵⁾ or mortgagee⁽⁶⁾ is entitled to stay the proceedings on payment of the rent and costs.

(d) *Judgment, &c.*—In case of judgment against the defendant for non-appearance, if it be made appear to the court

(1) C. L. P. Act, 1852, s. 210.

(2) *Doe d. Harcourt v. Roe*, 4 Taunt. 883.

(3) *Cross v. Jordan*, 8 C. B. 149, “Overruling”; *Doe d. Powell v. Roe*, 9 Dowl. 548. See also *Doe d. Gretton v. Roe*, 4 C. B. 577.

(4) C. L. P. Act, 1852, s. 212.

(5) *Doe d. Wyatt v. Byron*, 1 C. B. 628.

(6) *Doe d. Whitfield v. Roe*, 3 Taunt. 402.

in which the action is depending by affidavit, or be proved upon the trial in case the defendant appears, that half-a-year's rent was due before the writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter; in every such case the lessor recovers judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made.⁽¹⁾ A similar provision was contained in the 4 Geo. 2, c. 28. In order to be in a position to prove the absence of a sufficient distress, search should be made over the whole of the premises, and its result proved at the trial or alleged in the affidavit.⁽²⁾ Where the search could not be made, the premises being kept locked and access refused, an affidavit, stating the deponent's belief that there was no sufficient distress, was held sufficient.⁽³⁾

Affidavit of Service of Writ and of Rent being in Arrear.

In the Q. B. ["C. P." or "Exch. of Pleas."]

Between A. B., plaintiff,
and
C. D. defendant.

I, A. B., of , the above-named plaintiff, and I, J. S. of , attorney in this cause for the said A. B., severally make oath and say:

And first I, J. S., for myself say:

1. That I did [*state service of writ as ante*, p. 938.]

And I, the said A. B., for myself say:

2. That before and at the time the said writ was served as aforesaid, there was due to me, as the landlord of the said land and premises, for the recovery of the possession of which this action is brought, from the said C. D., who then was the tenant thereof, £ , for [half] a-year's rent of the same, under and by virtue of an indenture of lease dated the day of , A. D. 18 , and made between me of the one part and the said C. D. of the other part, and that, on the day of , A. D. , no sufficient distress was to be found on the said land countervailing the said arrears of rent then due.

3. That the said [half] year's rent of the said land became due on the day of , A. D. 18 .

4. That at the time of the said service of the said writ, and at the

⁽¹⁾ C. L. P. Act, 1852, s. 210.

⁽²⁾ *Doe v. Wandlass*, 7 T. R. 117; *Doe d. Chippendale v. Dyson*, 1 M. & M. 77.

⁽³⁾ *Doe d. Cox v. Roe*, 5 D. & L. 272.

time I claim by the said writ to have been entitled to the possession of the said land, I, the said A. B., had power to re-enter upon the said land, by virtue of the said lease, for the non-payment of the rent so in arrear as aforesaid. Sworn, &c.

Same where no tenant in actual possession.

[Title and commencement same as in last form.]

And first I, the said J. S., for myself say:

1. That on last, and for a long time before, the land and premises, for the recovery of the possession of which this action is brought, and which were lately in the occupation of the said C. D., was unoccupied, and there was no tenant in the actual possession thereof, and I therefore did, on the day and year aforesaid, affix a true copy of the writ in ejectment by which this action was commenced upon , being a notorious place of the said lands and premises comprised in the said writ.

2. That a true copy of the said writ is hereunto annexed, marked (A).

And I, A. B., for myself say:

3. That before and at the time at which the said copy of the said writ was so affixed as aforesaid, there was due to me *[stating that rent in arrear and insufficiency of distress as above]*.

4. That at the time of affixing the said copy of the said writ as aforesaid, and at the time I claim by the said writ to have been entitled to the possession of the said land, I had power to re-enter upon the said land by virtue of the said indenture, for the non-payment of the rent so in arrear as aforesaid. Sworn, &c.

Judgment bars lessee, when.]—In case the lessee or his assignee, or other person claiming or deriving under the said lease, permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, in such case the said lessee and all other persons claiming and deriving under the said lease, are barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for the reversal of such judgment, in case the same is erroneous; and the said lessor or landlord from thenceforth holds the demised premises discharged from such lease. But this does not extend to bar the right of any mortgagee of such lease, or any part thereof, who is not in possession, so such mortgagee, within six months after judgment obtained and execution executed, pays all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion, and perform all the

covenants and agreements which on the part and behalf of the first lessee are and ought to be performed.⁽¹⁾

(e) *Where tenant proceeds for relief in equity.*—By the Common Law Procedure Act, 1852, s. 211, “in case the said lessee, his assignee, or other person claiming any right, title, or interest, in law or equity, of, in, or to the said lease, shall, within the time aforesaid, proceed for relief in any court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into court and lodge with the proper officer such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case such proceedings for relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof, and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessee or landlord what the money so paid by him fell short of the reserved rent for the time such lessor or landlord held the said lands. And if such lessee, his executors, administrators, or assigns are relieved in equity, he and they shall hold and enjoy the demised lands according to the lease thereof made without any new lease.⁽²⁾

(f) *Costs of defendant.*—If, on such ejectment, a verdict pass for the defendant, or the claimant be nonsuited therein, the defendant is entitled to recover his costs.⁽³⁾

⁽¹⁾ C. L. P. Act, 1852, s. 210.

⁽²⁾ *Ibid.* s. 212.

⁽³⁾ *Ibid.* s. 210.

III. PROCEEDINGS WHERE EJECTMENT IS BY LANDLORD AFTER EXPIRATION OR DETERMINATION OF TERM.

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| <ul style="list-style-type: none"> (a) Notice requiring tenant to find bail. (b) In what cases may be served. (c) Form of notice. (d) Bail. (e) Default to find bail. | <ul style="list-style-type: none"> (f) Form of judgment in case of default. (g) Trial. (h) Staying execution, &c. (i) Recognizances and securities ; how to be taken. |
|--|---|

As the proceedings where a landlord brings ejectment after the term is expired or determined, where such term has been created by a lease or agreement in writing, differ in some respects from the ordinary proceedings in the action, if the plaintiff choose to avail himself of the provisions of the statute, such points of difference will, in this place, receive a separate consideration.

(a) *Notice requiring tenant to find bail.*—By the Common Law Procedure Act, 1852, s. 213, it is enacted, that “where the term or interest of any tenant, now or hereafter holding, under a lease or agreement in writing, any lands, tenements, or hereditaments, for any term or number of years certain, or from year to year, shall have expired or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing made and signed by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment for the recovery of possession, it shall be lawful for him, at the foot of the writ in ejectment, to address a notice to such tenant or person, requiring him to find such bail, if ordered by the court or a judge, and for such purposes as are hereinafter next specified.”

(b) *In what cases notice may be served.*—As the language of the New Procedure Act, and that of the 1 Geo. 4, c. 87, providing for analogous proceedings in the old action of ejectment, is precisely similar, so far as it is descriptive of the cases in which such proceedings may be resorted to, the cases in which a construction has been put upon the

words of the old act are applicable strictly to the new. They will, therefore, be shortly noticed. A parol letting is not within the provision,⁽¹⁾ an agreement for a term of three months certain is,⁽²⁾ but a tenancy for years, determinable on lives, is not,⁽³⁾ a term for years certain, and a holding over beyond the term is within the act.⁽⁴⁾ But where a term is determined by a notice, before its termination by effluxion of time, it is not within it.⁽⁵⁾ A lessee may proceed under it against his sub-lessee,⁽⁶⁾ and so may a tenant in common for his undivided moiety.⁽⁷⁾

(c) *Form of notice.*—The following may be the form of notice written at the foot of the writ in ejectment.⁽⁸⁾

Take notice, that you will be required, if ordered by the court or a judge, to give bail by yourself and two sufficient sureties, conditioned to pay the costs and damages to be recovered in this action.

(d) *Bail.*—“Upon the appearance of the party on an affidavit of service of the writ and notice, it shall be lawful for the landlord, producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the court, or apply by summons to a judge at chambers, for a rule or summons for such tenant or person to show cause, within a time to be fixed by the court or judge on a consideration of the premises, why such tenant or person should not enter into a recognizance, by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the claimants in the action; and it shall be lawful for the

(1) *Doe d. Bradford v. Roe*, 5 B. & Ald. 770; *Doe d. Thomas v. Field*, 2 Dowl. 542.

(2) *Doe d. Phillips v. Roe*, 5 B. & Ald. 766.

(3) *Doe d. Pemberton v. Roe*, 7 B. & C. 2.

(4) *Doe d. Marquis of Anglesey v. Roe*, 2 D. & R. 565.

(5) *Doe d. Cardigan v. Roe*, 1 D. & L. 540. See also *Doe d. Tindal v. Roe*, 1 Dowl. 143; *Doe d. Carter v. Roe*, 10 M. & W. 670.

(6) *Doe d. Watts v. Roe*, 5 Dowl. 513.

(7) *Doe v. Rotherham*, 3 Dowl. 690.

(8) C. L. P. Act, 1852, sched. (A), No. 21.

court or judge, upon cause shown, or upon affidavit of the service of the rule or summons, in case no cause shall be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute.”⁽¹⁾ Formerly the recognizance was taken to the extent of a year’s value of the premises, and a reasonable sum for the costs of the action, but not for mesne profits.⁽²⁾ But in a case where mesne profits can now be recovered on the trial, *i. e.* where the ejectment is brought by a landlord against his tenant, there does not appear to be any reason why they should not be included in the recognizance.

(*e*) *Proceedings in case of tenant’s neglect or refusal to find bail.*]—In case the party neglect or refuse to find bail as required by the rule or summons, and lay no ground to induce the court or judge to enlarge the time for obeying the same, then the lessor or landlord, filing an affidavit that such rule or order has been made and served and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit.⁽³⁾

(*f*) *Form of judgment.*]—The form of judgment in such case must be as follows, or to the like effect, it being prescribed by the Common Law Procedure Act, 1852, sched. (A), No. 21.

In the Queen’s Bench.

The day of A.D. 18 . [*Date of writ.*]
 Yorkshire, } On the day and year above written a writ of our Lady
 to wit. } the Queen issued forth of this court, with a notice there-
 under written, the tenor of which writ and notice follows in these
 words : that is to say,

[*Here copy the writ and notice, which latter may be as follows :—*]

“Take notice that you will be required, if ordered by the court or a judge, to give bail by yourself and two sufficient sureties, conditioned to pay the costs and damages which shall be recovered in this action.”

And C. D. has appeared by , his attorney, [*or in person*] to the said writ, and has been ordered to give bail pursuant to the statute, and has failed so to do. Therefore it is considered that the said [*here*

(1) C. L. P. Act, 1852, s. 213.

(2) *Doe d. Levi v. Roe*, 6 C. B. 272.

(3) C. L. P. Act, 1852, s. 213.

insert name of landlord] do recover possession of the land in the said writ mentioned, with the appurtenances, together with £ for costs of suit.

(g) *Trial.*]—In this, as in other cases of ejectment at the suit of a landlord, the plaintiff may give evidence of and recover the mesne profits.⁽¹⁾

(h) *Security upon stay of judgment or execution.*]—By the 215th section of the Common Law Procedure Act, 1852, it is provided, that “in all cases in which such security shall have been given as aforesaid, if upon the trial a verdict shall pass for the claimant, unless it shall appear to the judge before whom the same shall have been had that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such judge shall not, except by consent, make any order to stay judgment or execution, except on condition that within four days from the day of the trial the defendant shall actually find security by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made, if any, upon the premises, and which may happen to be thereupon from the day on which the verdict shall happen to have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be; provided always, that the recognizance last above mentioned shall immediately stand discharged and be of no effect, in case proceedings in error shall be brought upon such judgment, and the plaintiff in error shall become bound in the manner hereinbefore provided.”

*Form of Recognizance not to Commit Waste, &c., where
Judge stays Execution.*

You do jointly and severally acknowledge to owe to the plaintiff in this suit the sum of £ , on condition that you, G. H., do not commit any waste, or act in the nature of waste or other wilful damage, or sell or carry off any standing crops, hay, straw, or manure, produced or made on the premises in question in this cause, and which may be thereon, from the day on which the verdict in this action was given, to

⁽¹⁾ C. L. P. Act, 1852, s. 214; see *ante*, p. 956.

the day on which execution shall finally be made upon the judgment in this action, or the same judgment be set aside, as the case may be.

Are you content ?

Affidavit.]—The motion for bail is founded on an affidavit in the terms described by the act. It should show that the tenancy, if from year to year, has been determined by a regular notice to quit.⁽¹⁾ The execution of the lease may, it appears, be proved by a person who was not the attesting witness.⁽²⁾

The following may be the form of an affidavit to obtain rule for bail, &c., where tenant held under a lease under seal.

In the Q. B. ["C. P." or "Exch. of P."]

Between A. B., plaintiff,

and

C. D., defendant.

I, A. B., of _____, the above-named plaintiff, and I, J. S., of _____, attorney in this cause for the above-named plaintiff, severally make oath and say

And first I, the said A. B., for myself say—

1. That this action is brought for the recovery of a messuage [or as the case may be] and premises, with the appurtenances, situate in the parish of _____, in the county of _____, formerly held by the above-named C. D., as tenant thereof to me, under and by virtue of an indenture of lease, a counterpart of which is exhibited to me at the time of swearing this, my affidavit, and is marked (A).

2. That the said lease was duly executed by me, and is, as I believe, in the possession of C. D.

3. That the said term and interest of the said C. D. expired on the day of _____, and that the said C. D. was possessed of, and actually held and enjoyed the said messuage and premises, with the appurtenances, under and by virtue of the said lease, from the commencement of the term therein mentioned until the expiration thereof as aforesaid, and has continued from thence hitherto to hold, and still doth hold the same.

And I, the said J. S., for myself say—

4. That on or about the day of _____, A.D. _____, I was present and did see the said C. D. duly sign, seal, deliver, and execute the said counterpart of the said lease, and that the name C. D. thereunto subscribed, as the party executing the same, is of the handwriting of the

⁽¹⁾ *Doe d. Topping v. Host*, 7 Dowl. 487.

⁽²⁾ *Doe d. Gowland v. Roe*, 6 Dowl. 35.

said C. D., and that the name J. S. thereunto subscribed, as a witness of the execution thereof, is of the proper handwriting of me, this deponent.

5. That I, the said J. S., did on the day of , being after the expiration of the said term and interest of the said C. D. in the said messuage and premises, personally [*or "by leaving the same for him with a servant of the said C. D. at his then dwelling-house, and usual place of abode, situate in , ,"* or as the case may be] did serve the said C. D. with a demand of the possession of the said premises in writing, which said demand was directed to the said C. D., and was signed by the said A. B. and was and is as follows. [*Here copy the demand.*]

And I, the said A. B. further say—

6. That I caused the said C. D. to be served with the said demand as aforesaid, in order that I might obtain possession of the said messuage and premises; but the said C. D. thereupon refused, and hath yet hitherto refused and neglected to deliver up the possession thereof to me, or to any person on my behalf.

And I, the said J. S., further say—

7. That I did, on the &c., [*stating service of the writ and notice, as ante, p. 938.*]

Sworn, &c.

*Same where Tenancy was from Year to Year under a
Written Agreement.*

[*Title and commencement same as in preceding form.*] And first I, the said A. B., for myself say—

1. That this action is brought for the recovery of a messuage [*farm, lands, tenements*] and premises, with the appurtenances, situate in the parish of , in the county of , formerly held by the said C. D., the above-named defendant, as tenant thereof, from year to year, to me, under and virtue of an agreement in writing, which agreement is exhibited to me at the time of swearing this, my affidavit, and is marked (A).

2. That the said agreement was duly signed and executed by the said C. D. on the day of , A.D. 18 , and was also duly signed and executed by me on the same day.

3. That the said C. D. was possessed of and actually enjoyed the said messuage [*farm, lands, tenements*] and premises, with the appurtenances, from the day of , A.D. , under and by virtue of the said agreement, as tenant from year to year as aforesaid, until the day of , when his tenancy, as such tenant from year to year, was determined by a notice to quit in writing hereinafter mentioned, and that the said C. D. hath continued from thence hitherto to hold, and still doth hold the same.

And I, the said J. S., for myself say—

4. That I did, on the day of , personally serve the said

C. D. with a regular notice to quit the said messuage [*farm, lands, tenements*] and premises, with the appurtenances at [or "by leaving the same for him at his dwelling-house and usual place of abode, situate," &c., *as the case may be*] which said notice to quit was in writing, and was directed to the said C. D., and signed by the said A. B., and was and is as follows. [*Here copy the notice to quit.*]

5. That I did, on the day of , [*personally*] serve the said C. D. with a demand in writing, of the possession of the said messuage [*farm, lands, tenements*] and premises [or "by leaving the same for him with a servant of him, the said C. D., at his dwelling-house and usual place of abode, situate," &c., [*as the case may be*]] which said demand was directed to the said C. D., and was signed by the said A. B., and was and is as follows. [*Here set out the demand.*]

And I, the said A. B., further say—

6. That the year of the tenancy aforesaid ended on the day of , and that I caused the said notice to quit to be served upon the said C. D. as aforesaid, for the purpose of determining the said tenancy, on the day of , and that I caused the said C. D. to be served with the said demand in writing as aforesaid, in order that I might obtain possession of the said messuage [*farm, lands, tenements*] and premises; but the said C. D. hath yet hitherto neglected and refused to deliver up the possession thereof to me, and the said premises have not, nor hath any part thereof, been delivered up to me or to any person on my behalf.

And I, the said J. S., further say,—

7. That I did, on the, &c., [*stating service of writ and notice, as ante, p. 938.*]

Sworn, &c.

Form of Bail-piece.

In the, &c.

Between A. B., plaintiff,
and
C. D., defendant.

Venue, } The bail in this action, brought for the recovery of ["one
to wit. } messuage," &c., *as in writ*] are K. L., of , in the
county of , and L. M., of , in the said county, *baker*, each
of them, the defendant, and the said bail in £ , by rule of court.
[or "by order of the Hon. Mr. Justice ," or "Baron ."]
pursuant to the Common Law Procedure Act, 1852. J. S.

Attorney for the said defendant.

Taken and acknowledged, &c.

(i) *Recognizances and securities, how to be taken.*—The recognizances and securities must be taken "in such manner and by and before such persons as are provided and authorized in respect of recognizances of bail upon actions and suits

depending in the court in which any such action of ejectment shall have been commenced ; and the officer of the same court with whom such recognizances of bail are filed, shall file such recognizances and securities for which respectively the sum of 2*s.* 6*d.*, and no more, shall be paid ; but no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord.⁽¹⁾

IV. ACTION FOR MESNE PROFITS.

(a) Nature of action. | (b) Amount of damages.

(a) *Nature of action.*—After judgment in ejectment, the plaintiff may proceed by action of trespass against the defendant for the recovery of the mesne profits. As already said, where the ejectment is brought by a landlord against his tenant, the former may, after proof of his right to recover, give evidence of and recover the mesne profits from the day of the determination of the tenant's interest down to the time of the verdict, or some day specially mentioned in the verdict ; but, save in such case, a distinct action must be brought for the mesne profits, no other cause of action being allowed to be joined with ejectment ;⁽²⁾ and even where the mesne profits have been recovered on the trial in ejectment, an action may be subsequently brought for the mesne profits which may have accrued after the verdict, or the day down to which they were given, down to the day of the delivery of possession of the premises recovered in the ejectment.⁽³⁾ The action is to be brought against the person actually withholding possession. It lies against a tenant for the holding over of his under-tenants, if he identify himself with them.⁽⁴⁾ The recovery in ejectment operates as an estoppel against a defendant in that action denying the possession from the date of the writ in ejectment,⁽⁵⁾ provided it be pleaded.⁽⁶⁾ As the proceedings in this action

(1) C. L. P. Act, 1852, s. 216.

(2) *Ibid.* s. 41.

(3) *Ibid.* s. 214.

(4) *Doe v. Harlow*, 12 A. & E. 40.

(5) *Wilkinson v. Kirby*, 23 L. J. C. P. 224.

(6) *Mathew v. Osborne*, 13 C. B. 919 ; see also *Doe v. Challis*, 17 Q. B. 166 ; *Doe v. Wellsman*, 2 Exch. 368.

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are the same as in other personal actions, it is unnecessary to mention them further.

Amount of damages.]—The plaintiff may still, it would appear, recover as damages in the action for the mesne profits the costs of the ejectment, where there has been no appearance to the writ, and judgment has been signed under the Common Law Procedure Act, 1852, s. 177, no costs being given by the act in such case. In estimating the damages, the jury are not confined strictly to the mere rent or nominal value of the premises.⁽¹⁾ Ground rent necessarily paid by the defendant should be allowed for by them.⁽²⁾

⁽¹⁾ *Goodtitle v. Tombs*, 3 Wils. 121.

⁽²⁾ *Doe v. Hare*, 2 C. & M. 145.

CHAPTER XXXII.

REPLEVIN.

I. PROCEEDINGS TO OBTAIN THE REPLEVIN.

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| <p>(a) What may be replevied.
 (b) How replevin made.
 (c) The replevin bond.</p> | <p>(d) Form of replevin bond.
 (e) Capias in withernam.
 (f) Proceedings in the county court.</p> |
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II. REMOVAL OF PLAINT FROM COUNTY COURT.

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| <p>(a) What complaints may be removed.
 (b) Proceedings for removal.
 (c) Form of certiorari.</p> | <p>(d) Statement of grounds of removal, &c
 (e) Affidavit of ground of removal.
 (f) Bond on removal of complaint.</p> |
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III. PROCEEDINGS IN THE SUPERIOR COURT.

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| <p>(a) Rule to appear.
 (b) Time to declare.
 (c) Declaration.
 (d) Pleadings.
 (e) Judgment.
 (f) Judgment of non pros.</p> | <p>(g) Judgment for defendant on verdict.
 (h) Second distress.
 (i) Writ of second deliverance.
 (k) Execution.
 (l) Writ de retorno habendo.</p> |
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IV. ACTION ON BOND GIVEN TO SHERIFF.

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| <p>(a) Assignment of bond to avowant.
 (b) Who may sue, &c.</p> | <p>(c) Staying proceedings.
 (d) Judgment.
 (e) Action on bond given in county court.</p> |
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V. LIABILITY OF SHERIFF.

I. PROCEEDINGS TO OBTAIN THE REPLEVIN.

(a) *What may be replevied.*—A replevy is a delivery to the owner, by the sheriff, of his cattle or goods distrained upon any cause, upon surety that he will pursue the action against him that took them.⁽¹⁾ In practice this remedy is principally confined to cases of distress for rent, but replevin lies generally when goods have been unlawfully taken, though not as a distress.⁽²⁾ No replevy can, however, it appears, be made where the seizure is for a duty due to the Crown,⁽³⁾ or under execution on a judgment of one of the superior courts,⁽⁴⁾ or of an inferior court, or by virtue of a magistrate's warrant, issued under the authority of a statute;⁽⁵⁾ unless in the one case the seizure was made out of the jurisdiction of the local court,⁽⁶⁾ or, in the other, the magistrate acted without jurisdiction.⁽⁷⁾

(b) *How replevin made.*—The sheriff is compellable, upon complaint made to him out of court, by virtue of the Statute of Marlbridge, the 52 Hen. 3, c. 21, and upon the owner of the goods entering into sufficient surety, to sue the distrainer, and to make return of the goods and chattels, if return be awarded, to replevy; i. e. to return the goods to the owner, of whatever denomination they may be.⁽⁸⁾ By the 1 & 2 Phil. & Mary, c. 12, s. 3, every sheriff of a shire (as distinguished from the sheriff of a city or town corporate), is required to "depute, appoint, and proclaim" four deputies at least within his bailiwick, dwelling not more than twelve miles distant from each other, to make replevin in his name. Application must be made by the owner of the goods taken, either to the undersheriff or to one of the replevin clerks; and he, after satisfying himself as to the sufficiency of the sureties and taking the bond, will issue his warrant to an officer to cause the goods to be restored.

(1) Bac. Abr. "Replevin," A.

(2) *Mellor v. Leather*, 1 E. & B. 619; *Allen v. Sharp*, 2 Exch. 352.

(3) *Rex v. Oliver*, Bunb. 14.

(4) Gilb. "Replevin," 138.

(5) *Rex v. Monkhouse*, 2 Str. 1184; *Wilson v. Weller*, 1 B. & B. 57.

(6) *Milward v. Caffin*, 2 W. Bl. 1330.

(7) *Pritchard v. Stephens*, 6 T. R. 522. See also *Jones v. Johnson*, 5 Exch. 862.

(8) Co. Lytt. 145 b.

(c) *The replevin bond.*—By the Statute of Westminster,⁽¹⁾ sheriffs and bailiffs are required to receive of the plaintiff not only “pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded;” and it is enacted that, “if any take pledges otherwise he shall answer for the price of the beasts, and the lord that distrained shall have his recovery by writ that he shall restore unto him so many beasts or cattle; and if the bailiff be not able to restore, his superior shall restore.” The 11 Geo. 2, c. 19, s. 28, prescribes the form of security in case of replevin on a distress for any kind of rent; it requires that “all sheriffs and other officers having authority to grant replevin may and shall, in every replevin of a distress for rent, take in their own names, from the plaintiff and two responsible persons as securities, a bond in double the value of the goods distrained, such value to be ascertained by the oath of one or more credible witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is hereby authorized and required to administer, and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained in case a return shall be awarded, before any deliverance be made of the distress; and such sheriff or other officer as aforesaid taking any such bond shall, at the request and cost of the avowant or person making cognizance, assign such bond to the avowant or person aforesaid, by indorsing the same, and attesting it under his hand and seal in the presence of two or more credible witnesses. A rentcharge is within this statute;⁽²⁾ and, indeed, the form of bond directed to be taken by it is in practice taken, whatever may be the cause of the distress.⁽³⁾ It is usual, though not strictly proper, to add in the bond a condition for the sheriff’s indemnity, and to increase the penalty in proportion.⁽⁴⁾ Where the distress is not for rent, the sheriff may take the bond of the defendant alone, if he be sufficient,⁽⁵⁾ and in such cases the bond cannot be assigned, but the action must be in the name of the sheriff.⁽⁶⁾ Neither can it be assigned where, although the distress be for rent, the security is not according to the statute; but where only

(1) 13 Ed. 1, c. 2.

(2) *Short v. Hubbard*, 2 Bing. 349.

(3) *Blackett v. Crissop*, 1 Lord Raym. 278.

(4) *Miers v. Lockwood*, 9 Dowl. 975.

(5) *Hucker v. Gordon*, 1 C. & M. 58.

(6) *Edmonds v. Challis*, 7 C. B. 436.

one surety is taken in a case within the statute, he is notwithstanding liable.⁽¹⁾

(d) *Form of replevin bond.*—The following form of a replevin bond applies where the distress has been for rent or damage feasant.

Know all men by these presents, that we, A. B., of _____, E. F., of _____, and G. H., of _____, are jointly and severally held, and firmly bound to X. Y., Esq., sheriff of the county of _____, in the sum of £ _____ [*double the value of the goods taken*], to be paid to the said sheriff or his attorney, executors, administrators, or assigns, for which payment to be well and truly made we bind ourselves, and each and every of us, in the whole, our, and each, and every of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated this _____ day of _____, A. D. 18 ____.

The condition of the above obligation is such that if the above-bounden A. B. do appear at the next county court to be holden for the county of _____, at _____, and do prosecute his suit with effect and without delay against C. D., for the taking and unjustly detaining of certain goods and chattels, to wit [*stating the goods distrained*], and do duly make return of the said goods and chattels, if a return thereof shall be adjudged or awarded, that then this present obligation shall be void and of none effect, or else to be and remain in full force and virtue.

Sealed, signed and delivered, in the presence of me,

T. S.

Signatures and seals of obligors.

(e) *Capias in withernam.*—If the goods to be replevied cannot be found, and the officer returns an "eloignement," or removal to places unknown, the sheriff, having first ascertained the fact by a jury, may, and is bound to issue a *capias in withernam*, or warrant to seize other goods of the distrainer to the same value, which the plaintiff in the action of replevin may keep in pledge and use.⁽²⁾ The following is the form of this writ.

— } X. Y., Esq., sheriff of the said county: To all and
to wit. } singular my bailiffs of the said county, greeting. Whereas A. B. hath found me, _____, sufficient security as well to prosecute his plaint against C. D., for taking and unjustly detaining his [cattle] goods and chattels, to wit [*set out cattle and goods distrained*], as to make return thereof, if return thereof shall be awarded, and thereupon,

⁽¹⁾ *Austin v. Howard*, 7 Taunt. 28.

⁽²⁾ *Fitz. N. B.* 74 b.

by virtue of my office, I have often commanded you and every of you, that you, or some, or one of you, should cause to be replevied by the said A. B., his aforesaid [cattle] goods and chattels, which the said C. D. hath taken and unjustly detains as it is said. And you, upon my several precepts of replevin to you directed, have certified that the [cattle] goods and chattels aforesaid are eloigned to places to you unknown, and so that you cannot replevy the same to the said A. B. Therefore I now command you, and every of you, that you, or some or one of you, do take in withernam the [cattle] goods and chattels of the said C. D., to the value of the said [cattle] goods and chattels so eloigned as aforesaid, and deliver the same to the said A. B. for his [cattle] goods and chattels last aforesaid, and also that you put by gages and safe pledges to the said C. D., so that he be and appear at my next County Court, to be holden at _____, in and for the said county, on the _____ day of _____ next, to answer to the said A. B., of the plea aforesaid, and that you, or one of you, return an answer to this my mandate, at my said next County Court. Given under the seal of my office this _____ day of _____, A. D. 18 ____.

(f) *Proceedings in the county court.*—The owner of the goods must, after their restoration, summon the distrainor to appear at the next county court held for the district wherein the distress was taken,⁽¹⁾ and the question is tried there, unless the plaint be removed to a superior court.

II. REMOVAL OF PLAINT FROM COUNTY COURT.

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|----------------------------------|--|
| (a) What plaints may be removed. | (d) Statement of grounds of removal, &c. |
| (b) Proceedings for removal. | (e) Affidavit of ground of removal. |
| (c) Form of certiorari. | (f) Bond on removal of plaint. |

(a) *What plaints may be removed.*—Where the title to any corporeal or incorporeal hereditament, or to any toll, market, fair, or franchise is in question, in any action of replevin in the county court, or where the rent or damage in respect of which the distress has been taken is more than the sum of 20*l.*, the plaint may be removed from the county court; ⁽²⁾ but the county court has jurisdiction in all cases of replevin, and it is only if the parties take the proper steps

⁽¹⁾ 9 & 10 Vict. c. 95, ss. 119, 120.

⁽²⁾ *Ibid.* s. 121

in the cases specified for the removal of the plaint that it will not exercise such jurisdiction.⁽¹⁾

(b) *Proceedings for removal of plaint.*—The plaint is removed into the superior courts, as in other cases, by a writ of *certiorari*,⁽²⁾ as to which see the practice under that title.

(c) *Form of certiorari.*—The following is the form of a writ of *certiorari* to remove the plaint from the county court:—

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith: To the judge of the county court of _____, at _____, greeting: We being willing for certain causes to be certified of a plaint levied in our court before you against C. D., at the suit of A. B., in an action of replevin, command you that you send to us [or in C. P. "to our justices," or in the Exch. "to the barons of our Exchequer"] at Westminster, on _____, the plaint aforesaid, with all things touching the same, as fully and entirely as it remains in our court before you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness, &c.

(d) *Statement of grounds of removal of plaint and sureties.*—There are certain preliminary steps necessary to be taken in the court below before the removal of the plaint. These are prescribed by the County Courts Acts, and the County Court Rules of Practice, and are as follows: The plaint may be removed by either party. The party seeking to remove it is required by the 9 & 10 Vict. c. 95, s. 121, to declare to the court in which the action is brought the ground upon which it is sought to remove the plaint. This declaration may be made by the attorney of the party, or by one of several parties.⁽³⁾ By the 197th of the County Court Rules issued under the 12 & 13 Vict. c. 101, it is provided that "where either party is desirous of removing any plaint in replevin, in pursuance of sect. 121 of the 9 & 10 Vict. c. 95, he shall, at least five clear days before the return day

⁽¹⁾ *Reg. v. Raines*, 1 E. & B. 855; *Munegan v. Wheatley*, 6 Exch. 88.

⁽²⁾ Wilk. "Replevin," 26.

⁽³⁾ *Munegan v. Wheatley*, 6 Exch. 88.

of the summons, deliver to the clerk two copies of a notice, signed by himself, his attorney or agent, stating the ground of such removal, together with the names of the two sureties whom he proposes to become bound with him, in the form in the schedule ; and the clerk shall forthwith transmit one of the said copies of the said notice to the opposite party or parties, by prepaid post letter, and unless such notice is given, the party removing shall pay all the expenses to which the opposite party has been put by reason of such non-compliance with this rule, unless the judge shall otherwise order ; and in case a reasonable time has not been allowed to enable the clerk to ascertain the sufficiency of the sureties, the cause shall be postponed at the expense of the party seeking to remove, or upon such terms as the judge shall think fit.

The following is the form prescribed by the schedule annexed to the Rules of Practice in the County Court, made pursuant to 12 & 13 Vict. c. 101, s. 12 :—

No.
In the County Court of at .
Between A. B., plaintiff,
and
C. D., defendant. .

Take notice that I am desirous of removing this plaint in replevin into the , [court into which the replevin is to be removed] upon the ground that [state the ground] and that the two persons whom I propose to become bound with me as sureties according to the statute, are E. F., of , and G. H., of .

Dated this day of , 18 .
(Signed)

To the clerk of the court.

(e) *Affidavit for ground of removal of plaint.*—The following form is applicable where the ground upon which it is sought to remove the plaint is that the rent for which the distress was taken exceeds 20*l.* If the ground be that the title to any corporeal or incorporeal hereditament, &c., is in question, it must be so stated, together with facts, showing that such title is *bonâ fide* in question.

In the Q. B., [“ C. P.,” or “ Exch. of P.”]

I, A. B., of , make oath and say,

1. That on the day of I was served with a summons issued out of the County Court of , held under the 9 & 10 Vict. c. 95, and of which summons the following is a copy. [Set out the summons.]

2. That the following is a copy of the particulars of demand annexed to such summons. [*Copy particulars.*]

3. That I am the party in the said summons named as A. B.

4. That the goods mentioned in the said summons and particulars were distrained and taken as in the said summons mentioned by me, for rent due to me in respect of a house called and known as , which house I let to the said C. D., mentioned in the said summons, on or about the day of 18 , at the rent of £100 a-year.

5. That I distrained as aforesaid the said goods for £50, being one half-year's rent of the said house under the said letting.

6. That the rent, in respect of which the said distress was taken as aforesaid, and in respect of which the said action is pending, was and is more than the sum of £20.

(*f*) *Bond on removal of plaint.*—By the 9 & 10 Vict. c. 95, s. 121, the party must become bound with two sufficient sureties, to be approved by the clerk of the court, in such sums as the judge shall seem reasonable, regard being had to the nature of the action and the alleged value or amount of the property in dispute, or of the rent or damage, to prosecute the suit with effect and without delay, and to prove before the court in which such suit shall be tried that such title as aforesaid is in dispute between the parties, or that there was ground for believing that the said rent or damage was more than 20*l*. And by the 198th of the above rules it is required, that “the amount of the sum for which the security is taken shall, unless the judge shall otherwise order, be the same as that of the security given to the sheriff, and such security shall be given at the expense of the party seeking to remove.” The form of the bond is given in the schedule to the County Court Rules, 1851; but, although it does not comply with the requirements of the act, the bond itself is not thereby rendered void; it is good as a voluntary bond, and may be sued on by the obligee.⁽¹⁾

Form of bond.—The following is the form of the bond so prescribed:—

Know all men by these presents that we, C. D., of , E. F., of , and G. H., of , are jointly and severally held and firmly bound to A. B. in the sum of pounds of lawful money of Great Britain, to be paid to the said A. B., his certain attorney, executors, or administrators, for which payment, well and truly to be

⁽¹⁾ *Stansfield v. Hellawell*, 7 Exch. 373.

made, we bind ourselves and each and every of our heirs, executors and administrators firmly by these presents.

Sealed with our seals. Dated this day of , 18 .

Whereas, a certain action of replevin was on the day of commenced in the County Court of , holden at , wherein A. B. was plaintiff and C. D. the defendant. And whereas the said [C. D.] hath declared to the said court that the title to a certain corporeal [or "incorporeal" hereditament, or "to a certain toll," "market," "fair," or "franchise,"] is in question in the said suit, [or "that the rent," or "damage,"] in respect of which the distress in this behalf was taken, amounts to more than twenty pounds. Now the condition of this obligation is such that if the above bounden C. D. shall prosecute the said party with effect and without delay, in the court into which it is now about to be removed, and shall prove before the said last-mentioned court that such like as aforesaid is in dispute between the said parties, [or "that there was ground for believing that the said rent"] [or "damage,"] was of greater amount than "twenty pounds" than this present obligation shall be void, otherwise to remain in full force and virtue.

Signed, sealed, and delivered by the above bounden , in the presence of

C. D. (L. S.)
E. F. (L. S.)
G. H. (L. S.)

III. PROCEEDINGS IN THE SUPERIOR COURT.

- | | |
|---------------------------|---------------------------------|
| (a) Rule to appear. | (g) Judgment for defendant |
| (b) Time to declare. | on verdict. |
| (c) Declaration. | (h) Second distress. |
| (d) Pleadings. | (i) Writ of second deliverance. |
| (e) Judgment. | (k) Execution. |
| (f) Judgment of non pros. | (l) Writ de retorno habendo. |

(a) *Rule to appear.*—If the plaint be removed by the plaintiff (who in the action of replevin is always the owner of the goods), he must serve the defendant, whether it be in term or vacation, with a four-day rule to appear.⁽¹⁾

(b) *Within what time must declare.*—If the plaint be removed by the defendant, the plaintiff must, on the return of the *certiorari*, declare within the ordinary time thereafter required by the course of the courts for a declaration after appearance. If removed by the plaintiff, he must declare within the ordinary time after the appearance is entered.

⁽¹⁾ Reg. Gen. (Pr.) H. T. 1853, r. 115.

(c) *Declaration.*—The venue is local. No other cause of action can be joined with replevin.⁽¹⁾ The declaration may be as follows :—

On the day of , A. D. ,

“Y.” [Venue] } C. D. [the distrainor] was summoned to answer
to wit. } A. B. [the owner] of a plea wherefore he took the
goods and chattels [etc., as the case may be] of the plaintiff, and
unjustly detained the same; and thereupon A. B., by , his
attorney [or “in person” as the case may be], sues C. D., for that the
defendant, in the parish of , in the county aforesaid, in a certain
dwelling-house there, [as the case may be] called , took the
goods and chattels [as the case may be] of the plaintiff and unjustly
detained the same; and the plaintiff claims £ .

(d) *Pleadings.*—The defendant may plead the general issue *non cepit*, or confessing the taking, he may justify that it was lawful as a distress or otherwise. If the distress so alleged was made in his own right, it is called an avowry; if, as the servant of another, it is called a cognizance. It commences as follows :

The day of , A. D. ,

C. D. } And the defendant, by , his attorney [or “in
ats. } person”], well avows [or if the defendant justify as the
A. B. } servant of the landlord, “as bailiff of E. F., well acknow-
ledges”] the taking of the said goods, &c., in the declaration mentioned,
because, he says [etc., stating the facts relied on.]

The date when the rent became due must be stated truly in the avowry.⁽²⁾ The plaintiff pleads in bar to the avowry or recognizance. He cannot, it would appear, put all the facts in issue by a general traverse. This was attempted to be done in *Trent v. Hunt*: (9 Exch. 14.) The plaintiff pleaded to a cognizance of a distress for rent, that he denied the allegations therein contained, Baron Alderson delivering the judgment of the court said, that “had an application been made to a judge under the Common Law Procedure Act, he most probably would have compelled the plaintiff to traverse separately the tenancy, and the rent being in arrear, and would not have allowed him to mix the denial of the allegation with that of the authority to distrain in one general traverse.” The defendant replies to the plea. The pleadings are thus thrown into a reversed order from that in which they stand in an ordinary action. The prac-

⁽¹⁾ C. L. P. Act, 1852, s. 41.

⁽²⁾ *Roskeng v. Caddy*, 7 Exch. 840.

tice generally, with respect to the proceedings in ordinary actions, applies to the action of replevin; the issue is made up, and the cause taken down to trial, in the ordinary way. These steps, therefore, do not demand further notice here.

(e) *Judgment.*—A judgment for the plaintiff in replevin is for damages and costs; for the defendant, the judgment at Common Law, either upon a *non pros.* or upon a verdict on an avowry or cognizance,⁽¹⁾ was for a return of the goods and chattels distrained, and this the defendant may still take, and issue thereupon a writ of *retorno habendo*. Where the judgment is for the defendant, on an issue traversing the taking of the goods, the judgment is for a return irreplevisable, and for damages and costs.⁽²⁾ By the 17 Car. 2, c. 7, s. 2, where there is judgment of nonsuit before issue joined, in a cause where the distress is for rent, the defendant may make a suggestion in the nature of an avowry or cognizance for such rent, and the court, upon his prayer, will award a writ to the sheriff of the county where the distress was taken to inquire, by the oaths of twelve good and lawful men of his bailiwick, touching the sum in arrear at the time of such distress taken, and the value of the goods or cattle distrained, fifteen days' notice being given to the plaintiff or his attorney of the sitting of such inquiry. Upon the return of the inquisition, the defendant has judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto that value, and, in case they do not, then so much as the value of the goods and cattle so distrained shall amount unto, together with his full costs of suit; and shall have execution thereupon by *fi. fa.* or *elegit*, or otherwise, as the law shall require. By the same statute, in case the plaintiff is nonsuit after cognizance or avowry made and issue joined, or the verdict is given against the plaintiff, the jurors that are impannelled, or returned to inquire of such issue, are required at the prayer of the defendant to inquire concerning the sum of the arrears and the value of the goods or cattle distrained, and, thereupon, the avowant, or he that makes cognizance, is to have judgment for such arrears, or so much thereof as the goods or cattle distrained amounted unto, together with his full costs, and execution for the same, by *fi. fa.* or *elegit*, or otherwise, as the law

⁽¹⁾ *Butcher v. Porter*, 1 Show. 400.

⁽²⁾ 2 Lill. Reg. 457.

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shall require. The expression, "full costs," does not include the costs of the distress, and it does not entitle the defendant to more than costs as between party and party.⁽¹⁾ Besides the statute of Charles, the 21 Hen. 8, c. 19, s. 3, gives to the defendant avowing or making cognizance for "rents, customs, services, or for damage feasant, or other rent or rents," his damages and costs in case the plaintiff shall be nonsuit or otherwise barred. And the defendant, in such case, is entitled to a writ of inquiry to assess the damages.⁽²⁾ The 3rd section of the 7 Car. 2, c. 7, directs the issuing of a writ of inquiry to inquire the value of the distress, where there is an avowry or cognizance for rent, and judgment for the avowant, and directs that upon the return thereof judgment shall be given for the avowant, or him that maketh cognizance, for the arrears alleged to be behind in such avowry or cognizance, if the goods or cattle so distrained shall amount to that value, and, in case they shall not amount to that value, then for so much as the said good and chattels so distrained amount unto, together with his full costs of suit, and shall have like execution as aforesaid.

(f) *Judgment of non pros.*—The following is the form of a judgment of *non pros.* for want of a declaration, on 17 Car. 2, c. 7, s. 2, for arrears of rent, with award of *retorno habendo* and costs of inquiry, and the entry of inquisition and final judgment.

In the Q. B. ["C. P." or "Exch. of P."]

The day of , A. D. . — [Date of judgment.]

— } A. B., at whose suit C. D. was summoned to answer of a
to wit. } plea wherefore he took the [cattle], goods, and chattels of
the said A. B., and unjustly detained them against gages and
pledges until, &c., doth not further prosecute his writ in this behalf
against the said C. D. Therefore it is considered that the said A. B.
take nothing by his writ in this behalf, and that the said C. D. do go
thereof without day, &c., and that he have a return of the said
[cattle], goods and chattels, &c. And hereupon the said C. D.,
according to the statute in such case made and provided, suggests and
gives the court here to understand and be informed that [*here state
the avowry or cognizance*], and hereupon the said C. D., according to
the statute in such case made and provided, prays the writ of our
said Lady the Queen, to be directed to the sheriff of , to inquire
of the sum in arrear of the rent aforesaid, and it is granted to him,
&c. Therefore it is commanded to the said sheriff of that

(1) *Jamieson v. Trevelyan*, 24 L. J. Exch. 74.

(2) See 4 Jac. 1, c. 3; 8 & 9 Will. 3, c. 11; 3 & 4 Will. 4, c. 43, s. 34.

according to the statute aforesaid he diligently inquire, by the oath of twelve good and lawful men of his bailiwick, how much of the yearly rent aforesaid, at the time of taking and distraining the said [cattle], goods and chattels, was in arrear and unpaid, and how much the said [cattle], goods and chattels so aforesaid taken and distrained were worth, according to the true value of the same; and that the inquisition which the said sheriff shall thereupon take he make appear to our said Lady the Queen [*or in C.P. "to the justices here," or in the Exch. "to the barons here,"*] on _____, under his seal and the seals of those by whose oath he shall take the said inquisition, together with the writ of our said Lady the Queen, to him thereupon directed, the same day is given to the said C. D., at which day comes here the said C. D. by his attorney aforesaid, and the sheriff of _____ to wit, J. M., now here returns a certain inquisition indented, taken before him at _____, in the said county, on _____ [*day of inquisition*], by the oath of twelve good and lawful men of his county, whereby it appears that £ _____ of the said yearly rent was in arrear and unpaid, and due and owing from the said A. B. to the said C. D., at the time in the said suggestion mentioned, and of the distress taken, and that the [cattle], goods and chattels distrained were worth, according to the true value thereof £ _____.* Therefore it is considered that the said C. D. do recover against the said A. B. the said £ _____, being the arrearages of the said rent by the inquisition in form aforesaid found, and also £ _____ for his costs of defence in this behalf, which said arrearages and costs in the whole amount to £ _____.

If the goods were found to be of less value than the rent, instead of what follows after the asterisk in the preceding form insert this—
 "Therefore it is considered that the said C. D. do recover against the said A. B. the said £ _____, parcel of the said arrears of the said rent, being the value of the said [cattle], goods and chattels, by the said inquisition in form aforesaid found, and also £ _____ for his costs of defence in this behalf, which said value and costs in the whole amount to £ _____."

(g) *Judgment for defendant on verdict.*—The following is the form of a judgment at Common Law for a return, &c., on verdict for defendant :—

Therefore it is considered that the plaintiff take nothing by his writ aforesaid, and that the defendant do go thereof without day, and that the defendant have a return of the [cattle], goods and chattels aforesaid, to hold to him irreplevisable for ever. And it is further considered that the defendant do recover against the plaintiff £ _____ for his costs of defence in this behalf, and that the defendant have execution thereof, &c.

Where the judgment on verdict for defendant is under the 21 Hen. 8, c. 19, the entry of judgment is as follows :—

Therefore it is considered that the plaintiff take nothing by his said writ, and that the defendant do go thereof without day, &c., and that

the defendant have a return of the said [cattle], goods and chattels, to hold to him irreplevisable for ever. And it is further considered that the defendant do recover against the plaintiff his said damages and costs by the jurors aforesaid in form aforesaid assessed, and also £ for his costs of defence by the court here adjudged of increase to the defendant, which said damages and costs in the whole amount to £ , and that the defendant have execution thereof, &c.

(h) *Second distress.*]—Where a writ of inquiry has been executed under the statute of Charles, and the value of the distress is not found to be the full value of the arrears distrained for, “the party to whom such arrears were due, his executors or administrators, may, from time to time, distrain again for the residue of the said arrears.”⁽¹⁾

(i) *Writ of second deliverance.*]—After judgment of *non pros.*, *non-suit*, or other judgment for default, the defendant, if he wish again to replevy, can do so only by “a writ of second deliverance,” upon which the proceedings commence *de novo*, and this he can do only once.⁽²⁾ This writ stays the execution of the writ *de retorno habendo*, sued out by the defendant in replevin after judgment in his favour, but not the writ of inquiry to ascertain his damages sued out under the statute 21 Hen. 8, c. 19.⁽³⁾ It does not at all apply where the distress is for rent, and the defendant proceeds under the statute of Charles. The following is the form of this writ:—

VICTORIA, &c. To the sheriff of greeting: If A. B. shall make you secure of prosecuting his claim, and also of returning the [cattle], goods and chattels, which were lately adjudged to C. D. in our court of Q. B. [or “C. P.” or “Exch. of P.”], on account of the default of the said A. B., if a return thereof shall be adjudged: We command you that if, by virtue of our writ of *retorno habendo* to you thereupon before directed, you have caused the said [cattle], goods and chattels, to be returned to the said C. D., then that you cause them to be re-delivered to the said A. B., and put by gages and safe pledges the said C. D., that he be before us [or in C. P. “before our justices,” or in Exch. “before the barons of our Exchequer”], at Westminster, on , to answer to the said A. B. in a plea of taking and unjustly detaining of the [cattle], goods and chattels aforesaid, and have you there the names and pledges of this writ.

Witness ourself at Westminster, the day of A. D. 18 .

⁽¹⁾ 17 Car. 2, c. 7, s. 4.

⁽²⁾ 13 Edwd. 1, c. 2.

⁽³⁾ *Pratt v. Rutledge*, 1 Salk. 95.

(k) *Execution.*—As in ordinary cases, where a plaintiff has judgment for damages and costs, the execution is by *fi. fa.*, *ca. sa.* or *elegit.* If the defendant has judgment under the 17 Car. 2, c. 7, to recover the arrears of rent or value of the distress, he has execution by *fi. fa.*, *ca. sa.* or *elegit.* But when he has judgment at Common Law, he has execution by a writ *de retorno habendo* for a return of the goods, and also a *fi. fa.* or *ca. sa.* for his costs, and if under the stat. 21 Hen. 8, c. 19, for his damages as well as costs; and in such case the writ *de retorno habendo*, and the *fi. fa.* or *ca. sa.* may, it seems, be included in one writ.

(l) *Writ de retorno habendo.*—The sheriff is not bound to execute a writ *de retorno habendo*, unless some person attend for the defendant to point out the goods.⁽¹⁾ If the goods be conveyed to places unknown, so that he cannot execute the writ, the sheriff returns that the goods are “eloigned.” The defendant may, upon this return, sue out a *capias in withernam*, requiring the sheriff to take the goods of the plaintiff to the value of the goods eloigned, to be delivered to the defendant, and kept by him until the plaintiff shall deliver to him the goods originally replevied.⁽²⁾ The form of this writ in a case where the judgment is under 28 Hen. 8, c. 19, after verdict for defendant on a distress for rent, is as follows :—

VICTORIA, &c. To the sheriff of _____, greeting : Whereas, C. D. was summoned to be in our court of Q. B., [or “C. P.,” or “Exch. of P.”] to answer A. B. of a plea wherefore the said C. D., on [gc., as in the declaration.] And the said C. D., appearing in our said court by J. S., his attorney avowed, [gc., reciting the substance of the avowry] and the said A. B. in and by his pleas in bar of the said avowry, said that, [reciting the substance of pleas in bar] and afterwards by a jury of the country upon which, as well the said C. D. as the said A. B., hath put themselves in that behalf, taken on the _____ day of _____, A.D. _____, at _____, in your county, before _____, one of the justices assigned to hold pleas before the Queen herself and _____, one of the justices [or “barons,” &c., as the case may be] of our said lady the Queen, appointed to take the assizes for your said county, according to the statute in that case made and provided [if not at the assizes, say “before our chief justices, at _____, by virtue of our writ of *nisi prius*,” as the case may be] it was found that [gc., here

⁽¹⁾ 2 Saund. 74, b. c.

⁽²⁾ Anon. 2 Leon. 174.

state the finding of the jury in substance, as in the postea.] Whereupon it was afterwards considered in our said court that the said A. B. should take nothing by his writ aforesaid, and that the said C. D. should go thereof without day, &c., and that the said C. D. should have a return of the [cattle], goods and chattels aforesaid, to hold to him irreplevisable for ever. And it was further considered that the said C. D. should recover against the said A. B. the said money, by the jurors aforesaid in form aforesaid assessed, and also £ for his costs of defence in this behalf, by the said court adjudged of increase to the said C. D., the said damages and costs amounting in the whole to £ , and that the said C. D. should have execution thereof, &c. Therefore we command you that without delay you cause the [cattle,] goods and chattels aforesaid, to be returned to the said C. D. to hold to him irreplevisable in form aforesaid, and in what manner you shall execute this, our writ, make appear to us [or in the C. P., "to our said justices," or in Exch. "to the barons of our Exchequer,"] at Westminster, on . We also command you that you omit not by reason of any liberty of your county, but that you enter the same, and of the goods and chattels of the said A. B. in your bailiwick you cause to be made the said £ , together with interest upon the said £ at the rate of £4 per centum per annum from the day of , A.D. , on which day the judgment aforesaid was entered up, [&c., conclude as in ordinary cases.]

IV. ACTION ON BOND GIVEN TO THE SHERIFF.

- | | |
|---|---|
| <p>(a) Assignment of bond to avowant.</p> <p>(b) Who may sue, &c.</p> <p>(c) Staying proceedings.</p> | <p>(d) Judgment.</p> <p>(e) Action on bond given in county court.</p> |
|---|---|

(a) *Assignment of bond to avowant.*—The sheriff or other officer taking the bond is bound, at the request and cost of the avowant or person making cognizance, to assign the bond to him by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses.⁽¹⁾ The following may be the form of such assignment:—

Know all men by these presents that I, X. Y., Esq., sheriff of the county of , have, at the request of the within-named C. D., the avowant [or "person making cognizance"] in this cause, assigned over this replevin bond, unto him, the said C. D., pursuant to the

⁽¹⁾ 11 Geo. 2, c. 19, s. 23.

statute in such case made and provided. In witness whereof I have hereunto set my hand and seal of office, this day of ,
A.D. .

X. Y. (L.S.)

(b) *By whom and when action may be brought.*—If the bond so taken and assigned be forfeited, the avowant, or person making cognizance, may bring an action and recover thereupon in his own name.⁽¹⁾ The action can only be brought by the party who is defendant in replevin;⁽²⁾ but the assignment may be made to one only of several defendants, and the action brought by him alone.⁽³⁾ The action may be brought, although the plaint has not been removed,⁽⁴⁾ and in either of the courts.⁽⁵⁾ And it lies immediately that the plaintiff in the action of replevin fails by any means,⁽⁶⁾ and even although he has obtained judgment under the statute of Charles, if it remain unsatisfied;⁽⁷⁾ or if he delay for a considerable time to proceed in replevin, to the prejudice of the defendant.⁽⁸⁾ But if the delay be occasioned by the defendant himself, as if he never appeared, the bond is not forfeited.⁽⁹⁾

(c) *Staying proceedings.*—The court is empowered by the 11 Geo. 2, c. 19, s. 23, to give by a rule of court such relief to the parties upon such bond as may be agreeable to justice and reason, and such rule is made to have the nature and effect of a defeasance to such bond. This power has been exercised by staying the proceedings where it appeared that time had been given to the principal without the assent of the sureties,⁽¹⁰⁾ or that the defendant had not been able to declare in the replevin suit owing to the plaintiff's neglect to appear in that action.⁽¹¹⁾ The court has refused to interfere where the ground of application was

(1) 11 Geo. 2, c. 19, s. 23.

(2) *Page v. Eames*, 1 B. & P. 378.

(3) *Phillips v. Price*, 3 M. & S. 180.

(4) *Dias v. Freeman*, 5 T. R. 195.

(5) *Neilson v. Huntley*, 7 Dowl. 460.

(6) *Perreau v. Bevan*, 5 D. & L. 284.

(7) *Turner v. Turner*, 2 B. & B. 107.

(8) *Gent v. Cutts*, 11 Q. B. 288; *Harrison v. Wardle*, 5 B. & Ad. 146.

(9) *Evans v. Bowen*, 7 D. & L. 320.

(10) *Archer v. Hale*, 4 Bing. 464.

(11) *Evans v. Bowen*, 7 D. & L. 320.

matter of defence; ⁽¹⁾ and it will not in any case interfere, unless it clearly appears that the application is made on behalf of the sureties, and not of the principal.⁽²⁾ Proceedings will be stayed on the application of the sureties, upon payment of the amount of the rent, if it is less than the value of the goods and the costs secured by the bond; if the amount of the rent exceeds the value of the goods, then on payment of the value of the goods with the costs, and in both cases on payment also of the costs of the application.⁽³⁾ And proceedings will be stayed on payment of the penalty and costs, though the plaintiff's costs on the replevin suit exceed the penalty.⁽⁴⁾ If more than one action be brought on the bond, without sufficient reason, proceedings will be stayed on payment of the costs of one only.⁽⁵⁾

(d) *Judgment.*—The plaintiff, in an action on the bond, is entitled to recover the amount of the rent in arrear, or, if the value of the goods distrained be less, the value of such goods, and the costs of the action of replevin, to the extent at least of the penalty of the bond.⁽⁶⁾

(e) *Action on bond given in county court.*—It would appear that this bond will become forfeited in the same way, and that the action upon it is subject to the same rules, as with respect to the bond given to the sheriff.⁽⁷⁾

V. LIABILITY OF SHERIFF.

The sheriff is not bound to warrant the sufficiency of the pledges in a replevin bond.⁽⁸⁾ If they are apparently sufficient, it is enough; but if he or the replevin clerk redeliver the goods to the owner without any sureties or pledges, or if without proper inquiry he accept of persons who are insufficient,⁽⁹⁾ or who are not amenable by reason

⁽¹⁾ *Anon.* 5 Taunt. 776.

⁽²⁾ *Warton v. Blacknell*, 12 M. & W. 558.

⁽³⁾ *Miers v. Lockwood*, 9 Dowl. 975.

⁽⁴⁾ *Branscombe v. Scarbrough*, 6 Q. B. 13.

⁽⁵⁾ *Bartlett v. Bartlett*, 4 M. & G. 769.

⁽⁶⁾ *Gingell v. Turnbull*, 3 B. N. C. 881; *Ward v. Healey*, 1 Y. & J. 285; *Branscombe v. Scarborough*, 6 Q. B. 13.

⁽⁷⁾ See *Turncliffe v. Wilmot*, 2 C. & K. 626.

⁽⁸⁾ *Hindle v. Blades*, 5 Taunt. 224.

⁽⁹⁾ *Jefferson v. Bastard*, 4 A. & E. 823.

of infancy, &c.,⁽¹⁾ he is liable to an action at the suit of the party distraining,⁽²⁾ in which the plaintiff will recover all he would have been entitled to recover against the sureties.⁽³⁾ The costs of a fruitless action against the sureties may also be recovered as damages,⁽⁴⁾ provided notice of bringing it was previously given to the sheriff.⁽⁵⁾

(1) *Plumer v. Briscoe*, 11 Q. B. 46.

(2) *Richards v. Acton*, 2 W. & Bl. 1220.

(3) *Edmonds v. Challis*, 7 C. B. 413; *Paul v. Goodluck*, 2 Bing. N. C. 220.

(4) *Plumer v. Briscoe*, 11 Q. B. 46.

(5) *Baker v. Garratt*, 3 Bing. 56.

CHAPTER XXXIII.

ACTIONS ON BILLS OF EXCHANGE.

A SUMMARY mode of obtaining judgment is now competent in actions on bills of exchange. The 18 & 19 Vict. c. 67, s. 1, reciting that *bonâ fide* holders of dishonoured bills of exchange and promissory notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof, by reason of frivolous or fictitious defences to actions thereon, and it is expedient that greater facilities than now exist should be given for the recovery of money due on such bills and notes, enacts that "from and after the 24th of October, 1855, all actions upon bills of exchange or promissory notes, commenced within six months after the same shall have become due and payable, may be by writ of summons in the special form contained in schedule A. to this act annexed, and indorsed as therein mentioned; and it shall be lawful for the plaintiff, on filing an affidavit of personal service of such writ within the jurisdiction of the court, or an order for leave to proceed as provided by the Common Law Procedure Act, 1852, s. 17,⁽¹⁾ and a copy of the writ of summons and the indorsements thereon, in case the defendant shall not have obtained leave to appear and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in schedule B. to this act annexed (on which judgment no proceeding in error shall lie), for any sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any), to the date of the judgment, and a sum for costs, to be fixed by the Masters of the superior

(¹) See *ante*, p. 96.

courts, or any three of them, subject to the approval of the judges thereof, or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the plaintiff may, upon such judgment, issue execution forthwith." The holder of a dishonoured bill or note may recover the expenses of noting for non-acceptance or non-payment, in the same way as he may recover the amount of the bill or note: (s. 6.) These proceedings are competent in the Common Pleas at Lancaster and the Court of Pleas at Durham, or any other court of record in England and Wales, if so directed by an order in council: (ss. 8, 9.) An order in council has since directed the provisions of the act to extend to the county courts and many borough courts: (*Gazette*, 1 Feb. 1856.)

"The holder of any bill of exchange or promissory note may, if he think fit, issue one writ of summons according to this act against all or any number of the parties to such bill or note, and such writ of summons shall be the commencement of an action or actions against the parties therein named respectively, and all subsequent proceedings against such respective parties shall be in like manner, so far as may be, as if separate writs of summons had been issued:" (s. 6.)

Form of Writ of Summons. (Schedule A.)

VICTORIA, by the grace of God, &c. To C. D., of , in the county of . We warn you that unless, within twelve days after the service of this writ on you, inclusive of the day of such service, you obtain leave from one of the judges of the courts at Westminster to appear, and do within that time appear, in our court of , in an action at the suit of A. B., the said A. B. may proceed to judgment and execution. Witness, &c.

Memorandum to be subscribed on the Writ.

N. B.—This writ is to be served within six calendar months from the date hereof, or, if renewed from the date of such renewal, including the day of such date and not afterwards.

Indorsement to be made on the Writ before Service thereof.

This writ was issued by E. F., of , attorney for the plaintiff, [or this writ was issued in person by A. B., who resides at (mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence.)]

The plaintiff claims ⁽¹⁾ £ , principal and interest [or £ , balance of principal and interest], due to him as the payee [or indorsee] of a bill of exchange [or promissory note], of which the following is a copy [*here copy bill of exchange or promissory note and all indorsements upon it.*] And also shillings for noting (if noting has been paid), and £ for costs ;⁽²⁾ and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed.

NOTICE.

Take notice, that if the defendant do not obtain leave from one of the judges of the courts, within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do not within such time cause an appearance to be entered for him in the court out of which this writ issues, the plaintiff will be at liberty, at any time after the expiration of such twelve days, to sign final judgment for any sum not exceeding the sum above claimed, and the sum of £ for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the judge's chambers, Serjeant's-inn, London, supported by affidavit, showing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after Service thereof.

This writ was served by X. Y. on L. M. (the defendant) on Monday, the day of 18 .

X. Y.

Defendant applying to defend or stay proceedings.]—"A judge of any of the said courts shall, upon application within the period of twelve days from such service, give leave to appear to such writ and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits satisfactory to the judge which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the

⁽¹⁾ "No other claim than a claim on a bill of exchange or promissory note is to be included in writs issued under this act:" (Rule M. 1855.)

⁽²⁾ This part of the form, as to 'costs, was omitted in the act, but was supplied by Rule M. 1855. See *Robinson v. Cotterill*, 25 L. J., 3 Ex.

application, and on such terms, as to security or otherwise, as to the judge may seem fit.”⁽¹⁾

Or, “it shall be competent to the court or judge to order the bill or note sought to be proceeded upon to be forthwith *deposited* with an officer of the court, and further to order that all proceedings shall be stayed, until the plaintiff [shall have given security for the costs thereof.”⁽²⁾

Signing judgment and setting aside.—The judgment may be signed, when no appearance has been made on leave obtained by the defendant, as stated *ante*, p. 996 and p. 96. The costs fixed by the Masters, in pursuance of the act, are the following:—

	Above £20.			Under £20.		
Agency on country cases, including mileage	4	0	0	3	2	0
Agency on town cases	3	8	0	2	14	0

Form of Judgment (Schedule B.)

In the Queen's Bench.

On the day of , in the year of our Lord 18 .
[day of signing judgment.]

England } A. B., in his own person [or by his attorney],
to wit. } sued out a writ against C. D., indorsed as follows [*here copy indorsement of plaintiff's claim*], and the said C. D. hath not appeared.

Therefore it is considered that the said A. B. recover against the said C. D. £ , together with £ for costs of suit.

“After judgment the court or a judge may, under special circumstances, *set aside the judgment*, and, if necessary, stay or set aside execution, and may give leave to appear to the writ and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just.”⁽³⁾

Security in actions on lost bills of exchange.—When a negotiable bill of exchange, promissory note, or cheque is lost, and an action is brought on the same, or on the consideration, if the loss be specially pleaded, secondary

⁽¹⁾ 18 & 19 Vict. c. 67, s. 2.

⁽²⁾ *Ibid.* s. 4.

⁽³⁾ *Ibid.* s. 3.

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evidence is not admissible.⁽¹⁾ It is, however, provided by the Common Law Procedure Act, 1854, s. 87, that "in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge, or a Master, against the claims of any other person upon such negotiable instrument."

⁽¹⁾ *Ramus v. Crowe*, 1 Exch. 167; *Crowe v. Clay*, 9 Exch. 604; *Charnley v. Grundy*, 14 C. B. 608.

CHAPTER XXXIV.**WARRANT OF ATTORNEY—COGNOVIT—JUDGE'S ORDER—
JUDGMENT BY DEFAULT—REFERENCE TO MASTER—
WRIT OF INQUIRY.**

I. WARRANT OF ATTORNEY.

- | | |
|--|------------------------------|
| 1. Form of warrant. | 7. Warrants and cognovits by |
| 2. Defeasance. | bankrupts and insolvents. |
| 3. Stamp. | 8. Judgment. |
| 4. How executed. | 9. Execution. |
| 5. Attestation by attorney. | 10. Setting aside. |
| 6. Revocability by death or
marriage. | |

II. COGNOVIT.

- | | |
|---------------------------------|----------------------------------|
| 1. Form, stamp and attestation. | 3. Effect of, and setting aside. |
| 2. Judgment and execution. | |

III. JUDGE'S ORDER.

IV. JUDGMENT BY DEFAULT.

- | | |
|--|--------------------------|
| 1. Judgment for want of appear-
ance. | 2. For want of a plea. ✓ |
| | 3. Setting aside. |

V. REFERENCE TO THE MASTER.

VI. WRIT OF INQUIRY.

- | | |
|----------------------------|---------------------|
| 1. In what cases. | 4. Setting aside. |
| 2. Form, and how sued out. | 5. Judgment. |
| 3. Notice and trial. | 6. In debt on bond. |

1. *Warrant of Attorney.*

Where a party owes a debt and wishes to offer no defence to any action that may have been already brought, or wishes to save the expense of an action altogether,⁽¹⁾ he may give his creditor a warrant of attorney, which is a written authority enabling the latter to enter up judgment. In general, any person may give a warrant of attorney who is capable of appointing an attorney, subject to its being set aside on the grounds mentioned afterwards.

1. *Form of warrant.*—The warrant is generally in the following form:—

Form of Warrant of Attorney.

To P. A. and Q. A., gentlemen, attorneys of Her Majesty's court of _____, at Westminster, jointly or severally, or to any other attorney of the same court.

These are to desire and authorize you, the attorneys above-named, or any of you, or any other attorney of the court of _____, aforesaid, to appear for me, C. D. [or for us, C. D., of _____, and E. F., of _____, or either⁽²⁾ of us], of _____, at any time in the said court, and to receive a declaration for me [or us, or either of us], in an action for £ _____, for, &c., at the suit of A. B., his executors or administrators, and thereupon to confess the same action, or else to suffer judgment by *nil dicit* or otherwise to pass against me [or us, or either of us], therein and to be thereupon forthwith entered up against me [or us, or either of us], of record in the said court, for the said sum of £ _____, together with costs of suit. And I, [or we] the said C. D. [and E. F., and each of us], do hereby further authorize and empower you, the said attorneys, or any one of you, after the said judgment shall be entered up as aforesaid, for me and in my name [or for us and in our or either of our names], and as my [or our] act and deed, to sign, seal, and execute a good and sufficient release or releases in the law to the said A. B., his heirs, executors, and administrators of all and all manner of error and errors, proceedings in error, and all benefit and advantage thereof, and of all defects and imperfections whatsoever, had, made, committed, done, or suffered in, about, touching or concerning the aforesaid judgment, or in, about, touching or concerning any proceedings whatsoever, or in any way concerning the same.⁽³⁾ And for what you the said attorneys, or any one of you, shall

(1) *Baddley v. Shafto*, 8 Taunt. 434; *Reeves v. Slater*, 7 B. & C. 486; 1 M. & R. 265.

(2) If the words "and each of us," "for us, and in our name, and as our act and deed," are used, it is joint, and not joint and several: *Dalrymple v. Fraser*, 2 C. B. 698.

(3) A release of errors in this form does not extend to a judgment of outlawry: *Solomon v. Graham*, 5 E. & B. 309.

do or cause to be done in the premises, or any of them, this shall be to you, and every of you, a sufficient warrant and authority. In witness whereof I [or we, &c.] have hereto set my hand and seal the day of , in the year of our Lord .

C. D. (L.S.)

Signed, sealed and delivered by the above-named C. D., in the presence of me the undersigned W. A. And I hereby declare myself to be attorney for the said C. D., and that I subscribe this attestation as such his attorney. W. A.

2. *Defeasance.*]—"Every attorney or other person who shall prepare any warrant of attorney to confess judgment, which is to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the warrant is written, or cause a memorandum in writing to be made on such warrant, containing the substance and effect of such defeasance."⁽¹⁾ Any understanding between the parties not incorporated in the defeasance is no ground for issuing execution under the warrant,⁽²⁾ nor can a defeasance enlarge the authority given by the warrant.⁽³⁾ The omission of the attorney to comply with this rule does not make the warrant void, but he is answerable to the court for the neglect.⁽⁴⁾ Where there has been a defeasance, it must also be on the same paper or parchment as the warrant, otherwise it cannot be filed in pursuance of the Bankrupt and Insolvent Acts, as stated afterwards. When the defeasance stipulates that no revivor or *scire facias* will be necessary, and that judgment may be entered up after a year without leave of a court or judge, this, it seems, binds the defendant but not his representatives.⁽⁵⁾ It seems that a suggestion of breaches and *scire facias* within 8 & 9 Will. 3, c. 11, s. 8, are unnecessary on a warrant of attorney,⁽⁶⁾ even though the latter is a collateral security to the bond.⁽⁷⁾

⁽¹⁾ Rule Pr. 27, H. T. 1853; *Joel v. Dicker*, 5 D. & L. 1.

⁽²⁾ *Bell v. Tidd*, 9 Dowl. 949; *Robinson v. Robinson*, 3 D. & L. 134.

⁽³⁾ *Foster v. Claggett*, 6 Dowl. 524; *Chalk v. Wolton*, 1 D. & L. 39. See *Cuthbert v. Dobbin*, 1 C. B. 278, as to issuing successive executions.

⁽⁴⁾ *Sansom v. Goode*, 2 B. & Ald. 568; *Joel v. Dicker*, 5 D. & L. 1.

⁽⁵⁾ *Tripp v. Stanley*, 17 L. J. 19, Q. B.; 5 D. & L. 262; *Hiscocks v. Kemp*, 3 A. & E. 676; *Sherran v. Marshall*, 1 D. & L. 689.

⁽⁶⁾ *Shaw v. Marquis of Worcester*, 6 Bing. 385.

⁽⁷⁾ *Ansterbury v. Morgan*, 2 Taunt. 195.

Form of Defeasance.

Memorandum.—The within warrant of attorney is given to secure the payment from the within-named C. D. to the within-named A. B., of £ , with interest at 5*l.* per cent. per annum, on the day of (if by instalments state the period when each becomes due). And it is hereby agreed by and between the said parties that no action, execution, or other process or proceedings, shall be commenced, sued out, or prosecuted against the said C. D., his heirs, executors, or administrators, or against his or their lands, goods, or chattels, upon the judgment to be entered up in pursuance of the within warrant, until default shall be made in payment of the sum above-mentioned [or of some or any one of the instalments above-mentioned], and interest for the same as aforesaid, [and then only for the amount of the instalment or instalments which shall then be due and unpaid, together with interest for the same, or as the case may be]. And it is hereby agreed that the said A. B. shall be at liberty, under any writ of execution to be issued on the said judgment, to levy the costs of registering the said judgment, suing out the execution thereon, sheriff's poundage, officer's fees, and all other expenses of execution. And it is further agreed that it shall not, in the event of the said A. B. delaying to sue out execution on the said judgment for six years from the signing thereof, be necessary for him, his executors and administrators, to revive the said judgment by writ of revivor or otherwise, and that execution may issue without it; also, that in the event of judgment not being signed until after a year and a day from the execution hereof, it shall not be necessary for the said A. B. to obtain leave of the court or a judge to sign it, and that judgment may, notwithstanding, be signed after that time without such leave; also, that no proceedings in error shall be taken, or proceedings in equity, or any advantage taken or attempted to be taken by the said C. D., his heirs, executors, or administrators for or on account of the premises, or any other matter, cause or thing whatsoever, relating to, touching or in anywise concerning the issuing or executing of any such execution aforesaid, or any other proceeding which may be had or taken on the said judgment, or to enforce the execution thereof, according to the true intent and meaning of these presents. As witness our hands the day of 18 .

C. D.
A. B.

Witness, W. W.

3. *Stamp.*—The warrant of attorney requires to be on a proper stamp; or it may be stamped after execution on payment of the penalty,⁽¹⁾ though a rule nisi to set aside the judgment on that ground may have been obtained.⁽²⁾

⁽¹⁾ 13 & 14 Vict. c. 97, s. 12.

⁽²⁾ *Burton v. Kirby*, 7 Taunt. 174. See *Brembridge v. Wildman*, 1 Dowl. N. S. 774, where the court discharged the rule, without making the plaintiff pay the costs of it.

The defeasance does not require a separate stamp. ⁽¹⁾ The schedule to 13 & 14 Vict. c. 97, contains the following entry :—

Warrant of attorney (with or without a release of errors), to confess and enter up a judgment in any of Her Majesty's courts at Westminster, or in Ireland, or in any of the courts in the counties Palatine of Lancaster and Durham, or in any other court of record holding pleas where the debt or damage amounts to 40s., which shall be given as a security for the payment of any sum or sums of money, or for the transfer of any share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or of the Bank of Ireland, or of the East India Company, or of the South Sea Company, or of any other company or corporation: (*The same duty as on a bond for the like purpose.*)

Save and except where such payment or transfer shall be already secured by a bond, mortgage or other security, which shall have paid the proper *ad valorem* duty on bonds or mortgages imposed by law at the date thereof, exceeding in amount the sum of 5s., and also except where the warrant of attorney shall be given for securing any sum or sums of money exceeding 200*l.*, for which the person giving the same shall then be in actual custody under an arrest on meane process or in execution; and in those excepted cases a duty of ...

...	...	...	0	5	0
Warrant of attorney not otherwise charged in this schedule			1	15	0

The stamp duties on *bonds* referred to are given by the same statute as follows :—

Bond in England or Ireland, and personal bond in Scotland, given as a security for the payment of any definite and certain sum of money—

Not exceeding £50	...	...	...	0	1	3
Exceeding 50 and not exceeding £100	...	...	...	0	2	6
" 100	"	150	...	0	3	9
" 150	"	200	...	0	5	0
" 200	"	250	...	0	6	3
" 250	"	300	...	0	7	6

And where the same shall exceed 300*l.*, then for every 100*l.*, and also for any fractional part of 100*l.* ...

...	...	0	2	6
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Bond in England or Ireland, and personal bond in Scotland, given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or

⁽¹⁾ *Cawthorne v. Holben*, 1 N. R. 279.

which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be:

Where the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum.

(*The same duty as on a bond for such limited sum.*)

And where the total amount of the money secured or to be ultimately recoverable thereupon shall be uncertain and without any limit. (*The same duty as on a bond for a sum equal to the amount of the penalty of such bond.*)

And where there shall be no penalty of the bond in such last-mentioned case, such bond shall be available for such an amount only as the *ad valorem* duty denoted by any stamp or stamps thereon will extend to cover.

4. *How executed.*]—The date of execution, and not that of the warrant, is the time from which the latter speaks; ⁽¹⁾ and the date may be filled in after execution. ⁽²⁾ When the warrant includes a release of errors, it must be sealed, but otherwise this is not necessary. ⁽³⁾ The party must execute the warrant himself. ⁽⁴⁾ All the parties purporting to give the warrant must execute it. ⁽⁵⁾

5. *Attestation by an attorney.*]—"No warrant of attorney to confess judgment in any personal action, or a *cognovit actionem* given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person expressly named by him and attending at his request to inform him of the nature and effect of such warrant or *cognovit* before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." ⁽⁶⁾ "A warrant of attorney to confess judgment, or *cognovit actionem*, not executed in manner aforesaid, shall not be rendered valid by proof, that the person executing the same did, in fact, understand the nature and effect thereof, or was fully informed of the same." ⁽⁷⁾

The statute applies only to a warrant of attorney in a

⁽¹⁾ *Brown v. Burton*, 5 D. & L. 289.

⁽²⁾ *Keane v. Smallbone*, 17 C. B. 179.

⁽³⁾ *Kinnersley v. Mussen*, 5 Taunt. 264; *Brutton v. Burton*, 1 Chitt. R. 707.

⁽⁴⁾ 1 & 2 Vict. c. 110, s. 9.

⁽⁵⁾ *Harris v. Wade*, 1 Chitt. R. 322.

⁽⁶⁾ 1 & 2 Vict. c. 110, s. 9.

⁽⁷⁾ *Ibid.* s. 10.

personal action ; hence, though a cognovit in ejectment must be so attested, a warrant of attorney need not.⁽¹⁾ The statute applies, though the warrant or cognovit is executed out of the jurisdiction of the court.⁽²⁾ The attorney who attests may be uncertificated,⁽³⁾ and need not be an attorney of the court in which the judgment is to be signed.⁽⁴⁾ But an attorney's clerk cannot attest ;⁽⁵⁾ nor a person not an attorney, but *bonâ fide* believed and represented to be so by the defendant ;⁽⁶⁾ though if the defendant, *malâ fide*, represented him to be an attorney, the court may refuse to set aside judgment.⁽⁷⁾ If the party giving the warrant or cognovit is himself an attorney, no one need attest.⁽⁸⁾ The attorney must be present on behalf of the defendant, or of the several defendants,⁽⁹⁾ i. e., the plaintiff's attorney or agent will not suffice, though the defendant consent.⁽¹⁰⁾ And the attorney must in general attend at the positive request of the defendant, that is, the latter must show that he exercises a free choice. Yet if the defendant, finding an attorney present, adopt him for the occasion, this, in the absence of fraud, will suffice,⁽¹¹⁾ though the plaintiff pay such attorney for attending :⁽¹²⁾ all that is necessary being, that the defendant had a fair opportunity for exercising his discretion.⁽¹³⁾ The attorney attesting must *inform* the defendant of the nature and effect of the instrument ; but it is not essential that he should do so in private,⁽¹⁴⁾ or should

(1) *Doe v. Kingston*, 1 Dowl. N. S. 263 ; *Doe v. Howell*, 12 A. & E. 696 ; 4 P. & D. 361.

(2) *Davies v. Trevannion*, 2 D. & L. 743.

(3) *Holdgate v. Slight*, 2 L. M. P. 662.

(4) *Vilmot v. Barry*, Barnes, 44.

(5) *Barnes v. Ward*, Barnes, 42 ; *Paul v. Cleaver*, 2 Taunt. 360.

(6) *Wallace v. Brockley*, 5 Dowl. 696.

(7) *Cox v. Cannon*, 6 Dowl. 625 ; 4 Bing. N. C. 453 ; *Jeyes v. Booth*, 1 B. & P. 97.

(8) *Chipp v. Harris*, 5 M. & W. 430 ; *Downes v. Garbutt*, 2 Dowl. N. S. 939.

(9) *Haigh v. Frost*, 7 Dowl. 743 ; *Cooper v. Grant*, 12 C. B. 154.

(10) *Mason v. Kiddle*, 5 M. & W. 513 ; 8 Dowl. 207 ; *Pryor v. Swains*, 2 D. & L. 37 ; *Joel v. Dicker*, 5 D. & L. 1 ; *Cooper v. Grant*, 12 C. B. 154 ; *Sanderson v. Westley*, 6 M. & W. 98 ; *Hirst v. Hannah*, 17 Q. B. 557.

(11) *Walton v. Chandler*, 1 C. B. 306 ; 2 D. & L. 802 ; *Levinson v. Syer*, 2 L. M. P. 557 ; *Taylor v. Nichols*, 6 M. & W. 91 ; *Hale v. Dale*, 8 Dowl. 699.

(12) *Pease v. Wells*, 8 Dowl. 626. Or, though the plaintiff introduce the attorney to the defendant : (*Levinson v. Syer*, 2 L. M. P. 557.)

(13) *Gripper v. Bristow*, 6 M. & W. 807 ; *Rice v. Linstead*, 7 Dowl. 153 ; *Id.* 747.

(14) *Joel v. Dicker*, 5 D. & L. 1.

read it over to the defendant, unless perhaps the latter is very illiterate.⁽¹⁾ Moreover, the neglect of the attorney to inform the defendant will not make the instrument void ; ⁽²⁾ unless it is part of a fraud or collusion.⁽³⁾

The attestation clause should state that the attorney attends as such,⁽⁴⁾ and the form given *ante*, p. 1003, has been held sufficient.⁽⁵⁾ The requirements of the statute must be expressly stated in the clause,⁽⁶⁾ or appear by necessary implication, if the exact words of the statute be not used.⁽⁷⁾ Thus, the attestation has been held sufficient, though it does not expressly state that the attorney was appointed by the defendant ; ⁽⁸⁾ or attended at his request, and was named by him ; ⁽⁹⁾ or did not expressly declare him to subscribe as defendant's attorney ; ⁽¹⁰⁾ or to be an attorney of one of the superior courts.⁽¹¹⁾ It has, however, been held insufficient where it did not show with certainty that he was defendant's attorney, and attested as such.⁽¹²⁾ It is not necessary that the attesting attorney should sign his name at the foot of the attestation clause.⁽¹³⁾ Where, after the execution, the warrant is altered and re-executed, there should also be a new attestation.⁽¹⁴⁾ If the attestation be insufficient, a second may be added.⁽¹⁵⁾

6. *Revocability by death or marriage.*]—Though a warrant of attorney cannot be revoked expressly, it may be

(1) *Oliver v. Woodruffe*, 4 M. & W. 650 ; 7 Dowl. 166 ; *James v. Harris*, 6 Dowl. 184 ; *Taylor v. Parkinson*, 2 H. Bl. 383.

(2) *Haigh v. Frost*, 7 Dowl. 743.

(3) *Taylor v. Nicholls*, 6 M. & W. 91.

(4) *Potter v. Nicholson*, 8 M. & W. 294 ; 9 Dowl. 808 ; *Phillips v. Gibbs*, 16 M. & W. 208.

(5) *Lindley v. Girdler*, 1 D. & L. 699 ; *Ledgard v. Thompson*, 11 M. & W. 40.

(6) *Hibbert v. Barton*, 10 M. & W. 678 ; 2 Dowl. N. S. 434.

(7) *Pocock v. Pickering*, 18 Q. B. 784 ; *Elkington v. Holland*, 9 M. & W. 659 ; 1 Dowl. N. S. 643 ; *Lewis v. Lord Kensington*, 2 C. B. 463 ; 3 D. & L. 637 ; *Phillips v. Gibbs*, 16 M. & W. 208 ; *Pope v. Kershaw*, 2 B. C. Rep. 198.

(8) *Oliver v. Woodruffe*, 7 Dowl. 166.

(9) *Gay v. Hall*, 5 D. & L. 422.

(10) *Knight v. Hasty*, 12 L. J. 293, Q. B. ; *Phillips v. Gibbs*, 16 M. & W. 208 ; *Holt v. Kershaw*, 5 D. & L. 419.

(11) *Ibid.*

(12) *Hibbert v. Barton*, 10 M. & W. 678 ; 2 Dowl. N. S. 434 ; *Everard v. Popleton*, 5 Q. B. 181.

(13) *Lewis v. Lord Kensington*, 2 C. B. 463.

(14) *Bailey v. Bellamy*, 9 Dowl. 507.

(15) *Ledgard v. Thompson*, 11 M. & W. 40 ; 2 Dowl. N. S. 766.

so impliedly in some cases. Thus, the death of either party in general revokes the warrant; ⁽¹⁾ though, if the warrant authorize the plaintiff's representatives to enter up judgment, this may be done after the plaintiff's death; ⁽²⁾ but it must state this expressly. ⁽³⁾ So, where the warrant is given by two, and one die, if the warrant authorize it, judgment may be entered up against the survivor, ⁽⁴⁾ as where the words "against us or either of us" are used; ⁽⁵⁾ or the words "against me." ⁽⁶⁾ If the defendant gave the warrant to two plaintiffs, and one die, the survivor may enter up judgment. ⁽⁷⁾

If a *feme sole* give a warrant and marry, the court will, on application for leave, allow judgment to be entered up against the husband and wife. ⁽⁸⁾ So if a warrant be given to a *feme sole*, and she then marry, the court will allow judgment to be entered up in the name of husband and wife. ⁽⁹⁾ The rule in both cases is absolute in the first instance. ⁽¹⁰⁾ Where A. gave a warrant to C. and D. in contemplation of a marriage between A. and C., and as a security, it was held the judgment might be entered up by D., according to the warrant. ⁽¹¹⁾

7. *Warrants of attorney given by bankrupts and insolvents.*—Any execution, founded on a judgment on a warrant of attorney, or *cognovit actionem*, or judge's order obtained by consent, given by any trader by way of fraudulent preference, is invalid against his assignees in the event of his bankruptcy. ⁽¹²⁾ "Every warrant of attorney to confess judgment in any personal action, given by any bankrupt,

⁽¹⁾ Co. Lit. 52 b.; *Heath v. Brindley*, 2 A. & E. 368.

⁽²⁾ *Coles v. Haden*, Barnes, 44; *Edwards v. Holiden*, 9 Dowl. 1023.

⁽³⁾ *Henshall v. Matthew*, 7 Bing. 337; 1 Dowl. 217; *Foster v. Claggett*, 6 Dowl. 524; *Dalrymple v. Fraser*, 3 D. & L. 818.

⁽⁴⁾ *Gee v. Lane*, 15 East, 592; *Raw v. Alderson*, 7 Taunt. 453.

⁽⁵⁾ *Jordan v. Farr*, 2 A. & E. 437; *Dalrymple v. Fraser*, 3 D. & L. 818.

⁽⁶⁾ *Gladwin v. Scott*, Barnes. 53.

⁽⁷⁾ *Fendall v. May*, 2 M. & Sel. 76; *Johnson v. Jenkins*, 1 Dowl. 367; *Id.* 545; *Hind v. Kingston*, 6 Dowl. 523.

⁽⁸⁾ *Staples v. Purser*, 2 Dowl. 764; 3 M. & Se. 800; *Higginbotham v. Higginbotham*, 8 Dowl. 126; *id.* 226; see *Anon.* 1 Salk. 117.

⁽⁹⁾ *Marder v. Lee*, 3 Burr. 1469; *Metcalf v. Boots*, 6 D. & R. 46; *Anon.* 7 Mod. 53.

⁽¹⁰⁾ *Ibid.*; *Staples v. Purser*, 2 Dowl. 764.

⁽¹¹⁾ *Dolling v. White*, 22 L. J. 327, Q. B.

⁽¹²⁾ 12 & 13 Vict. c. 106, s. 135; *Newnham v. Stevenson*, 10 C. B. 913.

and within two months of the filing of a petition for adjudication of bankruptcy by or against such bankrupt, and being for or in respect of (wholly or in part) an antecedent debt or money demand, and every *cognovit actionem* or consent to a judge's order for judgment given by any bankrupt at any time after [11th Oct., 1849] and within two months of the filing of any such petition in any action commenced by collusion with the bankrupt and not adversely, or purporting to have been given in an action, but having been in fact given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engagements at the time of giving such warrant of attorney, *cognovit actionem* or consent, as the case may be, shall be deemed and taken to be null and void, whether the same shall have been given by such bankrupt in contemplation of bankruptcy or not."⁽¹⁾ "If after 11th Oct., 1849, any warrant of attorney to confess judgment in any personal action, or any *cognovit actionem* in any personal action shall have been given by any such trader, and such warrant of attorney or *cognovit actionem*, or a true copy thereof, shall not have been filed with the officer acting as clerk of the docket and judgments in the Court of Queen's Bench, within twenty-one days next after the execution thereof, in manner and form provided by 3 Geo. 4, c. 39, every such warrant of attorney and *cognovit actionem* shall be deemed fraudulent, null and void to all intents and purposes whatever; and if any such warrant of attorney or *cognovit actionem*, which shall be so filed as aforesaid, shall have been given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or *cognovit actionem* shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such warrant of attorney or *cognovit actionem* shall be null and void to all intents and purposes whatever."⁽²⁾ The warrant is not the less void under this clause, though the execution issued before the act of bankruptcy.⁽³⁾ The warrant must not only be filed, but the affidavit of execution also, within twenty-one days from the execution, though judgment was signed within the twenty-one days.⁽⁴⁾

(1) 12 & 13 Vict. c. 106, s. 135. See *Linnet v. Chaffers*, 4 Q. B. 762.

(2) *Ibid.* s. 136.

(3) *Bittleston v. Cooper*, 14 M. & W. 399; *Biffin v. Yorks*, 5 M. & Gr. 428.

(4) *Acraman v. Hernaman*, 16 Q. B. 998. See *Parker v. Watson*, 8 Exch. 404.

As regards insolvents, warrants of attorney, granted by them, are regulated by the statutes 3 Geo. 4, c. 39, 7 Geo. 4, c. 57, s. 33, 1 & 2 Vict. c. 110, s. 60, and 7 & 8 Vict. c. 96, s. 20. By the 3 Geo. 4, c. 39, s. 1, if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in the Queen's Bench, or a true copy if in any other court, shall, within twenty-one days after⁽¹⁾ the execution, be filed, together with an affidavit⁽²⁾ of the time of the execution, with the clerk of the dockets and judgments in the Queen's Bench. By s. 2, if after twenty-one days from the execution the granter of the warrant should be made bankrupt, and the warrant or a copy should not have been filed, or judgment signed, or execution issued within twenty-one days from the execution, it will be deemed fraudulent and void against the assignees,⁽³⁾ who are entitled to recover back the moneys or effects paid or taken under it. By s. 3, the same provisions are extended to cognovits.⁽⁴⁾ By s. 4, the defeasance or condition must, in order to be valid against the assignees, be written on the same paper or parchment before the warrant or cognovit is filed.⁽⁵⁾ By s. 5, the Master must keep a book containing the particulars of the warrant and cognovit filed; and by 6 & 7 Vict. c. 66, an index must be kept of the same, which is open to inspection. The fee is 1s. for a search, and an office copy may be had at the usual rate.⁽⁶⁾ If the debt should be satisfied, a judge, on being satisfied of the fact, may order a memorandum of satisfaction to be written upon it.⁽⁷⁾ If the parties subsequently enter into an agreement varying the terms of the warrant, the agree-

(1) i. e., exclusive of the day of execution, *Williams v. Burgess*, 12 A. & E. 636; 4 P. & D. 443.

(2) The affidavit must state the day of execution, *Dillon v. Edwards*, 2 M. & P. 550; *Robinson v. Robinson*, 3 D. & L. 134. On a cognovit it is intituled in the cause, but on a warrant it may be intituled only in the court, *Sowerby v. Woodruffe*, 1 B. & Ald. 567; *Ex parte Gregory*, 8 B. & C. 409; *Davis v. Stanbury*, 3 Dowl. 440.

(3) As between the parties the warrant is good, *Bennett v. Daniel*, 10 B. & C. 500; *Morris v. Mellon*, 10 B. & C. 446; *Aireton v. Davis*, 3 M. & Sc. 138; *Green v. Gray*, 1 Dowl. 350. It is enough if the judgment be signed within the twenty-one days, and execution may issue afterwards, *Green v. Wood*, 7 Q. B. 178.

(4) See *Bushell v. Boord*, 4 D. & L. 359.

(5) *Bennett v. Daniel*, 10 B. & C. 500; *Green v. Gray*, 1 Dowl. 350.

(6) 3 Geo. 4, c. 39, ss. 6, 7.

(7) *Ibid.* s. 8.

ment need not be filed.⁽¹⁾ If the warrant or cognovit is void for not being filed under 3 Geo. 4, c. 39 and 1 & 2 Vict. c. 110, s. 60, the defect may be taken advantage of at any distance of time,⁽²⁾ the party seeking to impeach the warrant being bound to prove the non-filing.⁽³⁾ An indenture given collaterally with a bond, and having the same legal effect as a cognovit, must be filed like a cognovit.⁽⁴⁾ Warrants given by an insolvent, before adjudication on his petition, are not secret warrants within 3 Geo. 4, c. 39, and are valid.⁽⁵⁾

8. *Judgment, when and how signed.*—The judgment entered up must be strictly in pursuance of the warrant, and cannot be signed unless the warrant or cognovit has been “delivered to and filed with the Master, who is hereby ordered to file the same in the order in which it is received.”⁽⁶⁾ It may be entered up without any leave within a year and a day from the date of the warrant, if otherwise the warrant authorizes it;⁽⁷⁾ and it seems not necessary first to enter appearance.⁽⁸⁾ The plaintiff must make an actual demand for payment, if the warrant was given to secure a payment on demand.⁽⁹⁾ If the warrant is given for a sum certain, but in substance to secure the plaintiff as surety for the defendant in a smaller sum, the plaintiff need not wait till he has been made to pay the whole sum as surety.⁽¹⁰⁾ If a particular time is specified at which judgment is to be signed, that time must be followed;⁽¹¹⁾ but an application to set aside a judgment not then signed must be made promptly.⁽¹²⁾ Where the

(1) *Harmer v. Johnson*, 3 D. & L. 39.

(2) *Everett v. Wells*, 2 Sc. N. R. 525; 9 Dowl. 424; *Biffin v. Yorke*, 6 Sc. N. R. 222; 5 M. & Gr. 429; *Brooke v. Mitchell*, 8 S. 739. (3) *Aireton v. Davis*, 3 M. & Sc. 138; 9 Bing. 740.

(4) *Hurst v. Jennings*, 5 B. & C. 650; 8 D. & R. 424.

(5) 1 Will. 4, c. 38, s. 3.

(6) Rule Pr. 25, H. T. 1853. See *James v. Howard*, 3 Q. B. 948.

(7) *Calvert v. Tomlin*, 5 Bing. 1; 2 M. & P. 1.

(8) *Nicholl v. Bromley*, 2 B. & B. 464; 5 Moore, 307; *Capper v. Dando*, 2 A. & E. 458; 4 N. & M. 335.

(9) *Charlesworth v. Ellis*, 7 Q. B. 669.

(10) *Barber v. Barber*, 3 Taunt. 465; *Carr v. Roberts*, 5 B. & Ad. 78; *Duke v. Watchorn*, 1 Dowl. N. S. 265; *Kirk v. Scott*, *id.* 267.

(11) *Mynn's case*, 1 Mod. 1; *Anon.* 7 Mod. 53.

(12) *Bate v. Lawrence*, 2 D. & L. 83; 8 Sc. N. R. 122; *Anderson v. Harrison*, 2 D. & L. 91. In many cases leave has been given to sign judgment, “as of” a certain term, *Alcock v. Sutcliffe*, 4 D. & L. 612; *Rayment v. Smith*, 1 D. & L. 166; *Jarvis v. South*, 1 D. & L. 962; 13 M. & W. 152; *Bate v. Lawrence*, 2 D. & L. 83; 8 Sc. N. R. 122; *Cobbold v. Chilver*, 4 M. & Gr. 62; 1 Dowl. N. S. 726, *Farnell v. Adams*, 1 Dowl. N. S. 869; *Coulson v. Clutterbuck*,

court in which judgment was to be entered up was not specified, but the "attorneys of the Queen's Bench" were alone authorized to enter it up, the court held the Queen's Bench was the proper court.⁽¹⁾ The amount of the sum for which judgment is to be entered up is in general double the amount due; and costs cannot be included, unless so specified,⁽²⁾ as perhaps it is stated to be by the phrase "a sum sufficient to cover the debt and costs."⁽³⁾ It is, however, only an irregularity to sign judgment for too large a sum.⁽⁴⁾ The judgment must be entered up in the name of the right party.⁽⁵⁾ Thus the executors cannot enter it up, unless named.⁽⁶⁾ If the warrant is given jointly by two, judgment cannot be entered up against one; nor, on the other hand, if given by one of several executors, can judgment be entered up against all.⁽⁷⁾

Leave of judge to sign judgment.—“Leave to enter up judgment on a warrant of attorney, above one and under ten years old, is to be obtained by order of a judge made *ex parte*, and, if ten years old or more, upon a summons to show cause.”⁽⁸⁾ The defeasance may, however, expressly dispense with the necessity of this leave.⁽⁹⁾ The party must apply to a judge and not to the court.⁽¹⁰⁾ An *ex parte* order may issue, though the defendant is insane;⁽¹¹⁾ but not where the warrant is more than ten years old, though the defendant admits the debt,⁽¹²⁾ or is resident abroad.⁽¹³⁾ The judge

2 Dowl. N. S. 391. If the judgment is to be entered up, only if the defendant become bankrupt or insolvent, this means “in insolvent circumstances,” *Biddlecombe v. Bond*, 5 N. & M. 621; see *Partridge v. Fraser*, 7 Taunt. 307; 1 Moore, 54.

⁽¹⁾ *Harris v. Peck*, 2 D. & L. 106.

⁽²⁾ *Page v. South*, 2 D. & L. 108; see *Chalk v. Walton*, 1 D. & L. 39; 6 Sc. N. R. 693; *Shipton v. Shipton*, 1 Dowl. 518.

⁽³⁾ *Thornton v. Merriew*, 3 B. & P. 362.

⁽⁴⁾ *Stopford v. Fitzgerald*, 4 D. & L. 725; *Hotham v. Somerville*, 9 Beav. 63.

⁽⁵⁾ *Doe v. Stewart*, 1 Dowl. N. S. 813; *Howard v. Batho*, 5 D. & L. 396; see *Webb v. Taylor*, 1 D. & L. 676. As to a public officer, see *Bell v. Fish*, 12 C. B. 493.

⁽⁶⁾ *Short v. Coglein*, 1 Anstr. 225.

⁽⁷⁾ *Gee v. Lane*, 15 East, 592; *Jordan v. Farr*, 2 A. & E. 437; *Dalrymple v. Fraser*, 2 C. B. 698; 3 D. & L. 611.

⁽⁸⁾ *Elwell v. Quash*, 1 Str. 20.

⁽⁹⁾ Rule Pr. 26, H. T. 1853.

⁽¹⁰⁾ *Sherran v. Marshall*, 1 D. & L. 689.

⁽¹¹⁾ *Handley v. Roberts*, 17 Jur. 440.

⁽¹²⁾ *Pigott v. Killick*, 4 Dowl. 287; 1 H. & W. 518.

⁽¹³⁾ *Nicholas v. Merit*, 9 Dowl. 101.

⁽¹⁴⁾ *Fletcher v. Everard*, 13 L. J. 44, Q. B.

may, under peculiar circumstances, refuse an *ex parte* order when the warrant is under ten years old, and grant only a summons *nisi*.⁽¹⁾ Leave is required to enter up judgment against husband and wife on a warrant granted by her *dum sola*.⁽²⁾ The judgment must be signed on the original, and not a copy of the warrant;⁽³⁾ and if the original is in the defendant's possession, the plaintiff may obtain a summons calling on the defendant to produce it.⁽⁴⁾ Where, however, a copy had been filed, and the original could not be found, and the attesting witness was dead, leave to sign judgment was granted.⁽⁵⁾ When a rule *nisi* only can be obtained, and the defendant is keeping out of the way, personal service of the rule on the defendant will be dispensed with.⁽⁶⁾ Though it is irregular to sign judgment without leave, when leave is necessary, no one but the defendant himself, or his representatives or assignees, can take the objection.⁽⁷⁾

Affidavit on obtaining leave.—There must be an affidavit on applying for leave to sign judgment. It should be entitled in the cause in which judgment is to be signed.⁽⁸⁾ If an attesting witness is not necessary to the warrant, as where the warrant is not given in a personal action, then such witness need not prove the warrant.⁽⁹⁾ As an attesting witness is, however, generally necessary to the execution, he must make an affidavit or join in one, unless he is dead,⁽¹⁰⁾ or is out of the jurisdiction,⁽¹¹⁾ or transported,⁽¹²⁾ or cannot be found;⁽¹³⁾ in which cases the court would receive secondary evidence, as an affidavit of one who saw the

(1) *Edwards v. Holiday*, 9 Dowl. 1023; *Lushington v. Waller*, 1 H. Bl. 94.

(2) *Hubbard v. Huggard*, 6 Jur. 950; *Dolling v. White*, 1 B. C. C. 170.

(3) *Anon.* 2 Jur. 944; *Jacob v. Neville*, 8 Dowl. 125.

(4) *Ibid.*

(5) *Doe d. Beaumont v. Beaumont*, 2 Dowl. N. S. 872; *Keane v. Arden*, 21 L. J. 159, Q. B.

(6) *Croft v. Lord Egmont*, 8 Dowl. 95; *Wortham v. Turk*, 9 Dowl. 335.

(7) *Jones v. Jones*, 1 D. & R. 558; *Cocks v. Edwards*, 2 Dowl. N. S. 55.

(8) *Bell v. Fisk*, 12 O. B. 496; *Ex parte Gregory*, 8 B. & C. 409; *Davis v. Stanbury*, 3 Dowl. 440.

(9) C. L. P. Act, 1854, s. 26.

(10) *Constable v. Wren*, 3 M. & Sc. 210 a.

(11) *Taylor v. Leighton*, 3 M. & Sc. 423; 2 Dowl. 746.

(12) *Edwards v. Penhey*, 2 Dowl. N. S. 425.

(13) *Young v. Showler*, 2 Dowl. 556; *Cope v. Lea*, 9 Dowl. 102; *Reid v. Ford*, 3 M. & Gr. 546; 1 Dowl. N. S. 187.

execution,⁽¹⁾ or knew the handwriting of the witness,⁽²⁾ or heard the defendant acknowledge the execution.⁽³⁾ But the illness of the witness is no ground for the want of an affidavit.⁽⁴⁾ The court or a judge will compel the attesting witness to make an affidavit,⁽⁵⁾ and may make him pay the costs of the rule or summons.⁽⁶⁾

The affidavit should in general state the consideration and the sum outstanding due.⁽⁷⁾ The defendant himself is the proper party to make the affidavit on this point; ⁽⁸⁾ unless he has allowed his attorney⁽⁹⁾ or attorney's clerk to manage the matter;⁽¹⁰⁾ or where, the plaintiff being a lunatic, another person has taken charge;⁽¹¹⁾ or being a public officer, another has been appointed.⁽¹²⁾

The affidavit should also, unless the warrant expressly stipulate the contrary,⁽¹³⁾ show that the defendant⁽¹⁴⁾ is alive, i. e., should state the deponent's belief of that fact on reasonable grounds,⁽¹⁵⁾ such as from having seen him alive six days before;⁽¹⁶⁾ or even three⁽¹⁷⁾ or five weeks before;⁽¹⁸⁾ or if abroad, four months ago,⁽¹⁹⁾ or eight months ago;⁽²⁰⁾ or

(1) *Huthwaite v. Hood*, 5 M. & P. 321.

(2) *Jones v. Knight*, 1 Chitt. R. 743; *Young v. Showler*, 2 Dowl. 556.

(3) *Laing v. Kaine*, 2 B. & P. 85; *Reid v. Ford*, 3 M. & Gr. 546; 1 Dowl. N. S. 187.

(4) *Owen v. Holles*, 4 Dowl. 572.

(5) *Clark v. Elwick*, 1 Str. 1; *Doe d. Avery v. Roe*, 6 Dowl. 518; C. L. P. Act, 1854, s. 48.

(6) *Ibid.*; *Ex parte Morrison*, 8 Dowl. 94.

(7) *Barton v. Turner*, 8 Dowl. 122; *Hulke v. Pickering*, 2 B. & C. 555; 4 D. & R. 5; *Hill v. Enoe*, 7 Jur. 1038; but see where the security was of a guarantee, *Pickering v. Carnell*, 8 Dowl. 300.

(8) *Ibid.*; or his clerk, *Cobbold v. Adams*, 10 Jur. 72.

(9) *Ashman v. Bowdler*, 2 C. & M. 212; 4 Tyr. 84.

(10) *Middleton v. Stockdale*, 1 Dowl. N. S. 776.

(11) *Coppendale v. Sunderland*, Barnes, 42; see *Capper v. Dando*, 2 A. & E. 458; 4 N. & M. 335.

(12) *Howard v. Batho*, 5 D. & L. 396.

(13) *Chipp v. Stanley*, 11 Jur. 1062; 5 D. & L. 262.

(14) Or, if the warrant is joint, all the defendants, *Lot v. Anderson*, 1 Dowl. N. S. 305.

(15) *Richardson v. Scholesfield*, 2 Dowl. N. S. 36; *Anon.* 11 Jur. 611.

(16) *Jordan v. Farr*, 2 A. & E. 437; 4 N. & M. 347; *Watson v. Matthews*, 2 Dowl. N. S. 670.

(17) *Watts v. Bury*, 4 Dowl. 44.

(18) *Stockes v. Willes*, 5 Dowl. 221; see *O'Neill v. Coghlan*, 2 D. & L. 5; *Knell v. Joy*, 4 Dowl. 600; 1 H. & W. 670.

(19) *Roundell v. Powell*, Willes, 66; *Fursey v. Pilkington*, 2 Dowl. 452; *Bayley v. Western*, 7 Dowl. 601; see as to a transported convict, *Dalrymple v. Fraser*, 3 D. & L. 611.

(20) *Pemberton v. Browning*, 2 Bing. 204; *Grantley v. Summers*, 6 Dowl. 478; *Hawks v. Harris*, 1 Dowl. N. S. 261.

from having received a letter of defendant, dated abroad, some days or weeks before,⁽¹⁾ that being sufficient *prima facie* evidence of his being alive.⁽²⁾ Hearsay information is insufficient.⁽³⁾

Form of Judgment.

In the Q. B. ["C. P." or "Exch. of P."]

On the day of , [day of signing judgment.]
Middlesex, } A. B., by P. A., his attorney, sues C. D. for money
 } to wit. } payable by the defendant to the plaintiff, for money found
 } to be due from the defendant to the plaintiff, on accounts stated be-
 } tween them, and the plaintiff claims £ . Therefore it is considered
 } that the plaintiff do recover against the defendant his said debt of
 } £ , and £ for his costs of suit.

Form of Affidavit to enter up Judgment after a Year.

[Title of court and cause.]

I, A. B., of , the above-named plaintiff, I, D. A., the attorney
 for the said plaintiff, and I, D. A. C., of , clerk of the said D. A.,
 severally make oath and say:—

And first I, the said A. B., for myself, say:

1. That before the execution of the warrant of attorney hereinafter-
 mentioned, C. D., the above-named defendant, was justly and truly
 indebted unto me in £ , for (*state cause of action shortly*).

2. That the said C. D., being so indebted to me did, on , in the
 year of our Lord , after the said debt had become payable, give
 unto me (*recite the bond, if any, warrant of attorney, and defeasance*).

3. That the said C. D. hath not paid to me, or to any person for me
 or on my behalf, the said £ , but that the same, together with
 interest thereon, making altogether £ , is still due and owing
 unto me from the said C. D.

And I, the said D. A., for myself say:—

4. That I was present on the day of , A. D. , and
 did then see the said C. D. duly execute the said warrant of attorney,
 and that the said C. D. did then sign, seal, and as his act and deed deliver
 the said warrant of attorney, in my presence, and that the name, C. D.,
 at the foot thereof, is of the proper handwriting of the said C. D., and
 that the name D. A., subscribed to the said warrant of attorney, as that
 of the witness thereof, is my handwriting.

And I, the said D. A. C., for myself say:—

⁽¹⁾ *Grantley v. Summers*, 6 Dowl. 478; *Hopley v. Thornton*, 2 D. & R. 12.

⁽²⁾ *Sanders v. Jones*, 1 Dowl. 367; *Gray v. Withers*, 4 Dowl. 636; *Goodman v. Trevannion*, 9 Dowl. 328; so is a cheque drawn by defendant, *Jacobs v. Griffiths*, 5 Dowl. 577.

⁽³⁾ *Key v. Montague*, 1 Dowl. N. S. 853; *Levi v. Cohen*, 2 Dowl. N. S. 687; *Reeder v. Whip*, 5 Dowl. 576.

5. That I personally know the said C. D., and I verily believe that he is now living, for I saw him alive at _____, on _____, &c.
Sworn, &c.

A. B.

D. A.

D. A. C.

Judgment is signed by taking an *incipitur* of the declaration to the proper office, with the warrant of attorney, to be filed if not already filed, together with the judge's order to sign judgment, when such order is necessary.

9. *Execution.*]—The execution issues as in ordinary cases, unless the warrant otherwise provides. Thus, it may provide that no execution shall issue until a demand is made; or, on the other hand, that it may issue before the debt is paid, for which the execution is an indemnity,⁽¹⁾ or before more than one instalment is due.⁽²⁾ If the execution is indorsed for a larger amount than is due, the court may order it to stand only for the real amount,⁽³⁾ and may refer it to the Master to ascertain that amount;⁽⁴⁾ or perhaps an action may be maintained against the plaintiff,⁽⁵⁾ or the plaintiff may be made to refund.⁽⁶⁾ A *scire facias* may be necessary as in ordinary cases,⁽⁷⁾ but breaches need not be suggested under 8 & 9 Will. 3, c. 11, as warrants of attorney to secure an annuity or payment by instalments are not within that statute.⁽⁸⁾

Where the warrant of attorney is granted by an insolvent previous to adjudication on his petition in the Insolvent Court, the Insolvent Court alone can, afterwards, order satisfaction to be entered up, and the superior court has no jurisdiction to do so.⁽⁹⁾

(¹) *Barber v. Barber*, 3 Taunt. 465; *Duke v. Watchorn*, 1 Dowl. N. S. 265; *Kirk v. Scott*, 1 Dowl. N. S. 267; *Robinson v. Robinson*, 3 D. & L. 134.

(²) *Leveridge v. Forty*, 1 M. & Sel. 706; *Ross v. Tomlinson*, 3 Dowl. 49. As to charging in execution on each default, see *Davis v. Gompertz*, 2 Dowl. 407; *Cuthbert v. Dobbin*, 1 C. B. 278. And as to taking in execution on one default, *Atkinson v. Bagster*, 1 Bing. N. C. 444; 1 Hodg. 7.

(³) *Brown v. Burton*, 5 D. & L. 289.

(⁴) *Tilby v. Best*, 16 East, 165; *Greenslade v. Vaughan*, 8 Dowl. 687.

(⁵) *Wentworth v. Bullen*, 9 B. & C. 840.

(⁶) *Bell v. Tidd*, 9 Dowl. 949.

(⁷) *Kavanagh v. Gudge*, 7 M. & Gr. 318.

(⁸) *Cox v. Rodbard*, 3 Taunt. 74; *Kinnersley v. Mussen*, 5 Taunt. 264; *James v. Thomas*, 5 B. & Ad. 40; 2 N. & M. 663.

(⁹) 1 & 2 Vict. c. 110, ss. 87, 92; *Sturgis v. Joy*, 2 E. & B. 739.

10. *Setting aside warrant of attorney, &c.*—When the warrant of attorney is not *properly attested*, no one but the defendant, or his assignees in bankruptcy or insolvency,⁽¹⁾ or other person claiming under him,⁽²⁾ can take this objection, though third parties may be prejudiced by a judgment against the common debtor.⁽³⁾ The defendant is not precluded from objecting, though he is an outlaw,⁽⁴⁾ or proceedings in bankruptcy have commenced against him;⁽⁵⁾ but he may be, if he has recognized the validity of the judgment he seeks to set aside.⁽⁶⁾ If the fault in the attestation makes the warrant a nullity, the application to set aside the judgment and execution may be made at any time,⁽⁷⁾ and the defendant may, sometimes, get the costs of the application.⁽⁸⁾ Where two parties gave a warrant as sureties, and one, having paid, recovered the half against his co-surety, the court refused to allow the latter to object to the attestation.⁽⁹⁾

So the court will order the warrant to be cancelled, or set aside the judgment and execution, if it has been obtained by fraud or misrepresentation,⁽¹⁰⁾ or for an illegal consideration.⁽¹¹⁾ Mere absence of consideration seems no ground

(1) *Cocks v. Edwards*, 2 Dowl. N. S. 55; *Hirst v. Hannah*, 17 Q. B. 383.

(2) *Lewis v. Earl Tankerville*, 11 M. & W. 109; 2 Dowl. N. S. 754; *Hume v. Lord Wellesley*, 8 Q. B. 521.

(3) *Chipp v. Harris*, 5 M. & W. 430.

(4) *Davis v. Trevannion*, 2 D. & L. 743.

(5) *Taylor v. Nicholls*, 6 M. & W. 91; *Pinches v. Harvey*, 1 Q. B. 868.

(6) *Coke v. Brummell*, 2 Moore, 495. See *Hirst v. Hannah*, 17 Q. B. 383.

(7) *Cocks v. Edwards*, 2 Dowl. N. S. 55; *Gripper v. Barstow*, 6 M. & W. 807; 8 Dowl. 797.

(8) *Cooper v. Grant*, 12 C. B. 154.

(9) *Kemp v. Finden*, 12 M. & W. 421; *Price v. Carter*, 7 Q. B. 838.

(10) *Duncan v. Thomas*, 1 Doug. 196; *Anon.* 2 Keny. 294; *Martin v. Martin*, 3 B. & Ad. 934; *Turner v. Shaw*, 2 Dowl. 244.

(11) As, to compound a felony, *Webb v. Taylor*, 1 D. & L. 676; *Ex parte Critchley*, 3 D. & L. 527; see *Ward v. Lloyd*, 6 M. & Gr. 785; to defraud creditors, *Harrod v. Benton*, 8 B. & C. 217; *Martin v. Martin*, 3 B. & Ad. 934; *Sharpe v. Thomas*, 6 Bing. 416; *Brown v. Burton*, 5 D. & L. 289; *Tabram v. Freeman*, 2 Dowl. 375; *Rogers v. Kingston*, 2 Bing. 441; *Jackson v. Davison*, 4 B. & Ald. 691; to charge an ecclesiastical benefice, *Hewett v. Saltmarsh*, 1 A. & E. 812, and authorities there cited; *Bishop v. Hatch*, 7 Dowl. 753; to pay a gaming debt, *Lane v. Chapman*, 11 A. & E. 966; to stay an application to strike an attorney off the rolls, *Kerwan v. Goodman*, 9 Dowl. 330; to pay a debt discharged by the Insolvent Act, *Smith v. Alexander*, 5 Dowl. 13; *Ex parte Hart*,

for defendant's applying.⁽¹⁾ Where there is a doubt as to the warrant being fraudulent or forged, the court will refuse to try the question on a motion of this kind, and will direct an issue;⁽²⁾ so, if the fact of the consideration be doubtful,⁽³⁾ or if the question be otherwise difficult and important;⁽⁴⁾ or the application may be dismissed altogether.⁽⁵⁾ If the consideration is in part good and in part bad, the warrant will be held valid as to the former part only.⁽⁶⁾

The court will also cancel the warrant on the ground that the defendant was an *infant*,⁽⁷⁾ though the consideration was for necessities;⁽⁸⁾ or if it was joint, then the judgment may be set aside as to the infant.⁽⁹⁾ So, as to a *feme covert*,⁽¹⁰⁾ and a judgment confessed to a *feme covert* is void.⁽¹¹⁾ The warrant, however, is not rendered invalid by the defendant becoming insane afterwards;⁽¹²⁾ nor by a subsequent security being taken, unless the latter is agreed to be substituted.⁽¹³⁾

Where judgment has been *irregularly signed*, the court may set it aside at the plaintiff's instance, so as to allow it to be re-signed regularly,⁽¹⁴⁾ the rule being *nisi* only in the

2 D. & L. 778; *Denne v. Knott*, 7 M. & W. 144; *Jackson v. Burnham*, 8 Exch. 173; to secure an annuity void by the Annuity Act, *Ex parte Chester*, 4 T. R. 694; *Earle v. Browne*, 10 A. & E. 412; *Wade v. Simeon*, 13 M. & W. 647; to secure costs of an uncertificated attorney, *Wilton v. Chambers*, 7 A. & E. 524; 2 N. & P. 392; or attorney's future costs, *Jones v. Hunter*, 1 Dowl. 462; *Holdsworth v. Wakeman*, *id.* 532.

⁽¹⁾ *Gay v. Hall*, 5 D. & L. 422; *Cooke v. Wright*, 5 D. & L. 275.

⁽²⁾ *Harrod v. Benton*, 8 B. & C. 217; 2 M. & R. 130; *Gibson v. Bend*, Barnes, 239; *Brown v. Burton*, 5 D. & L. 289.

⁽³⁾ *Ibid.*; *Cook v. Jones*, 2 Cowp. 727.

⁽⁴⁾ *Brown v. Holt*, 4 Taunt. 587.

⁽⁵⁾ *Flight v. Chaplin*, 2 B. & Ad. 112; *Webb v. Taylor*, 1 D. & L. 676; *Brembridge v. Wildman*, 1 Dowl. N. S. 774.

⁽⁶⁾ *Holdsworth v. Wakeman*, 1 Dowl. 532.

⁽⁷⁾ *Weaver v. Stokes*, 1 M. & W. 203; 4 Dowl. 724.

⁽⁸⁾ *Saunderson v. Marr*, 1 H. Bl. 75; *Oliver v. Woodruffe*, 4 M. & W. 650; 7 Dowl. 166.

⁽⁹⁾ *Motteaux v. St. Aubin*, 2 W. Bl. 1133; *Wood v. Heath*, 1 Chitt. 708; *Ashlin v. Langton*, 4 M. & Sc. 719.

⁽¹⁰⁾ *Oulds v. Sansom*, 3 Taunt. 261; *Fairthorne v. Blaquire*, 6 M. & Sel. 73.

⁽¹¹⁾ *Roberts v. Pierson*, 2 Wils. 3. See *Dolling v. White*, 1 B. C. C. 170.

⁽¹²⁾ *Piggott v. Killick*, 4 Dowl. 287.

⁽¹³⁾ *Stowell v. Eade*, 4 Bing. 134; *Anon.* 2 Chitt. R. 423.

⁽¹⁴⁾ *Coulson v. Clutterbuck*, 2 Dowl. N. S. 391.

first instance.⁽¹⁾ If the defendant apply, he must apply generally within four days after notice of the irregularity.⁽²⁾

If the *execution* has issued against good faith, it may be set aside;⁽³⁾ also it may be set aside *pro tanto*, if issued for more than is due.⁽⁴⁾

The application to cancel or set aside, on the ground of no consideration, may be made by any party interested in doing so;⁽⁵⁾ and, on the ground of fraud, can, in general, only be made by third parties.⁽⁶⁾ On the ground of infancy or marriage, third parties cannot object.⁽⁷⁾ The affidavit in support should show that the application is made by or on behalf of the right party.⁽⁸⁾ The successful party, in general, gets his costs of the application.⁽⁹⁾

II. COGNOVIT.

- | | |
|---------------------------------|----------------------------------|
| 1. Form, stamp and attestation. | \| 3. Effect of, and setting aside. |
| 2. Judgment and execution. | |

1. *Form, stamp and attestation.*—When an action has been commenced against the defendant who wishes to offer no defence, but requires time to pay, it is usual for him to give the plaintiff a cognovit, which is a written confession of the action, and an authority to the plaintiff to enter up judgment on certain terms. Sometimes the defendant's pleading partly implies a confession of the action, as where he is sued as executor or administrator, and pleads *plene administravit*.⁽¹⁰⁾ So where the defendant allows judgment by default, he impliedly confesses the action.⁽¹¹⁾ A cognovit, however, is an express confession, and is given on terms which are stated on the face of it, otherwise they will be disregarded by the court,⁽¹²⁾ unless in special

(1) *Bennet v. Simons*, 2 D. & L. 98.

(2) *Alcock v. Sutcliffe*, 4 D. & L. 612.

(3) *Joel v. Dicker*, 5 D. & L. 1; *Pinches v. Harvey*, 1 Q. B. 868.

(4) *Browne v. Burton*, 5 D. & L. 298.

(5) *Harrod v. Benton*, 8 B. & C. 217; *Martin v. Martin*, 2 B. & Ad. 934.

(6) *Doe d. Roberts*, 2 B. & Ald. 367; *Dukes v. Saunders*, 1 Dowl. 522.

(7) *Motteaux v. St. Aubin*, 2 W. Bl. 1133; *Ashlin v. Langton*, 4 M. & Sc. 719.

(8) *Hume v. Lord Wellesley*, 8 Q. B. 521.

(9) *Colebrook v. Layton*, 1 N. & M. 374. See *Ex parte Hart*, 2 D. & L. 778.

(10) See *ante*, "Executors," pp. 660, 662.

(11) See *post*, "Judgment by default."

(12) *Anon.* 1 Salk. 400; *Anon.* 7 D. & R. 375; the party in such case is left to his action on the agreement.

circumstances.⁽¹⁾ It generally stipulates to take no advantage by way of error or of filing a bill in equity, or setting aside for irregularity, or requiring *scire facias*,⁽²⁾ which is a valid stipulation,⁽³⁾ at least against the defendant,⁽⁴⁾ though not perhaps against his representatives.⁽⁵⁾ The defeasance, as in the case of a warrant of attorney, must be written on the same paper or parchment, in order to comply with the Bankrupt and Insolvent Acts, *ante*, p. 1010. The cognovit may be given at any stage of the cause; but not before the action is commenced;⁽⁶⁾ though it may be before service of the writ,⁽⁷⁾ or after the time limited for service thereof.⁽⁸⁾ It is generally given after the declaration,⁽⁹⁾ and if after the plea, it provides for withdrawing such plea, in which case it is called a *cognovit actionem relicta verificatione*. The cognovit, like a warrant of attorney, cannot be given by an infant,⁽¹⁰⁾ or *feme covert*.⁽¹¹⁾ Where several join in giving a cognovit, the signature of the first is the date from which it speaks.⁽¹²⁾

No particular form is necessary, and a deed may in substance be a cognovit.⁽¹³⁾ The following is the usual form:—

Form of Cognovit.

In the Q. B. [or "C. P." or "Exch. of P."]

Between A. B., plaintiff,
and

C. D. defendant.

I confess this action, and that the plaintiff is entitled to recover in it £ , which sum the plaintiff is entitled to recover against me in

(1) *Dillon v. Brown* 6 Mod. 14; *Hatton v. Young*, 2 W. Bl. 943.

(2) See *Shaw v. Marquis of Worcester*, 6 Bing. 387; 4 M. & P. 21.

(3) *Webb v. Taylor*, 1 D. & L. 676; *Best v. Gompertz*, 2 Cr. & M. 427; 2 Dowl. 325.

(4) *Sherran v. Marshall*, 1 D. & L. 689; *Tripp v. Stanley*, 5 D. & L. 262; *Morgan v. Burgess*, 1 Dowl. N. S. 850.

(5) *Heath v. Brindley*, 2 A. & E. 368; *Mann v. Audley*, 5 Dowl. 596.

(6) *Shanley v. Colwell*, 6 M. & W. 543; 8 Dowl. 373; it is also void if given by a bankrupt within two months before the bankruptcy, 12 & 13 Vict. c. 106, s. 135, *ante*, p. 1010.

(7) *Kirby v. Jenkins*, 2 Tyr. 499; *Wade v. Smith*, 8 Price, 513.

(8) *Richardson v. Daly*, 4 M. & W. 384; 7 Dowl. 25.

(9) *Clarke v. Jones*, 3 Dowl. 277.

(10) *Oliver v. Woodriffe*, 4 M. & W. 650; 6 Dowl. 300.

(11) *Fairthorne v. Blaquiere*, 6 M. & Sel. 73.

(12) *Perry v. Turner*, 2 Cr. & J. 89; 1 Dowl. 300.

(13) *Hurst v. Jennings*, 5 B. & C. 650.

this action, besides the costs of suit to be taxed by one of the Masters, [or to the amount of £ ,] and in case I shall make default in payment of the said sum of £ , together with the said costs, on the day of next, the plaintiff shall be at liberty to enter up judgment for the said sum of £ , together with the said costs, and also the costs of entering up such judgment and registering the same, and shall also be at liberty thereupon forthwith to sue out execution for the said sum and costs. And I undertake not to take any proceedings either in error in this action or in equity, nor do any other matter or thing to delay the said plaintiff from entering up judgment or suing out execution therein as aforesaid; also that it shall not at any time, or in any event, be necessary, previous to issuing the said execution, to revive the said judgment.

Dated, &c.

C. D.

Signed by the above-named C. D. in my presence, and I }
 declare myself to be attorney for the said C. D., and }
 that I subscribe my name as such attorney. D. A. }

Stamp.]—No stamp is necessary, unless the cognovit contains some terms of agreement, and the debt is above 20*l.*; where, however, there is an agreement above that amount, as to pay by instalments,⁽¹⁾ to postpone the day of payment,⁽²⁾ it must be stamped as an agreement. Where the cognovit contains a stipulation not to take advantage of its being before declaration, this is no agreement in that sense;⁽³⁾ nor where it merely gives the defendant time.⁽⁴⁾ The cognovit may be stamped after execution on payment of the penalty of 10*l.*,⁽⁵⁾ though in the meantime a summons may have been taken out to set it aside, which will in that case be discharged without costs.⁽⁶⁾

Attestation and filing.]—A cognovit must, by 1 & 2 Vict. c. 110, s. 9, be attested in the manner stated *ante*, p. 1006. It must also be filed in order to its validity against bankrupts or insolvents, as stated *ante*, p. 1010.

Judgment and execution.]—Judgment must be signed in pursuance of the cognovit; and if no time is specified, then the plaintiff can sign judgment at any time,⁽⁷⁾ though no step has been taken for a year.⁽⁸⁾ It is a question of construction

(1) *Ames v. Hill*, 2 B. & P. 150; *Morley v. Hall*, 2 Dowl. 494.

(2) *Pitman v. Humphreys*, 2 Tyr. 500.

(3) *Green v. Gray*, 1 Dowl. 350.

(4) *Jay v. Warren*, 1 C. & P. 532.

(5) 12 & 13 Vict. c. 97, s. 12.

(6) *Bremridge v. Wildman*, 1 Dowl. N. S. 774.

(7) *Calvert v. Tomlin*, 5 Bing. 1; 2 M. & P. 1.

(8) *Thompson v. Langridge*, 1 Exch. 351.

what the cognovit authorizes, and what is meant by "failure to pay by instalments" ⁽¹⁾ "on the final hearing of a chancery suit," ⁽²⁾ "on payment of the debt and costs." ⁽³⁾ Parol evidence cannot be allowed to alter the terms of the cognovit. ⁽⁴⁾ Judgment cannot be regularly signed after the defendant's tendering the amount. ⁽⁵⁾ Before signing judgment, if the defendant has not appeared, appearance for him must be entered. ⁽⁶⁾ The cognovit must be filed like the warrant of attorney; ⁽⁷⁾ but "no declaration to ground judgment shall be necessary or allowed on the taxation of costs." ⁽⁸⁾ The costs, if to be taxed, must be taxed after the usual notice. ⁽⁹⁾

Execution issues according to the terms of the cognovit. If the judgment is not final, a writ of inquiry must first be sued out. If the cognovit is to secure payment by instalments, unless it is stated to the contrary, judgment may be signed and execution issue on non-payment of each instalment. ⁽¹⁰⁾

Setting aside.]—The court will set aside the cognovit, if procured by fraud, ⁽¹¹⁾ or given by an infant, ⁽¹²⁾ or an insolvent by way of fraud on other creditors. ⁽¹³⁾ So, if the execution is issued against good faith, or not in pursuance of the cognovit, the court may set it aside, as in case of a warrant of attorney, *ante*, p. 1018. If too much has been levied, the court may refer to the Master to inquire into the real amount due. ⁽¹⁴⁾

III. JUDGE'S ORDER.

Where the defendant has no defence, and an action has

⁽¹⁾ *Barnett v. Partington*, 4 Bing. N. C. 487; 7 Dowl. 447; *Rose v. Tomlinson*, 3 Dowl. 49.

⁽²⁾ *Jones v. Reynolds*, 1 A. & E. 384; 3 N. & M. 465.

⁽³⁾ *Booth v. Parker*, 3 M. & W. 54; 6 Dowl. 87.

⁽⁴⁾ *Woodman v. Ford*, 2 Jur. 1.

⁽⁵⁾ *Anon.* 1 Dowl. 173.

⁽⁶⁾ *Hawkins v. Hassells*, 12 M. & W. 776; 1 D. & L. 1006.

⁽⁷⁾ Rule Pr. 25, H. T. 1853, *ante*, p. 1012.

⁽⁸⁾ Direct. Tax. 5, H. T. 1853.

⁽⁹⁾ *Booth v. Parker*, 3 M. & W. 54; *Wilson v. Northem*, 4 Dowl. 212; *Griffiths v. Liversedge*, 2 Dowl. 143.

⁽¹⁰⁾ *Davis v. Gompertz*, 2 Dowl. 407; 2 N. & M. 607.

⁽¹¹⁾ *Anon.* 1 Chitt. B. 268.

⁽¹²⁾ *Oliver v. Woodruffe*, 4 M. & W. 650.

⁽¹³⁾ *Tabram v. Freeman*, 2 Dowl. 375; *Collins v. Benton*, 9 Dowl. 905.

⁽¹⁴⁾ *Charrington v. Laing*, 3 M. & P. 587; 6 Bing. 242; *Wilson v. Price*, 4 Dowl. 213; *Evans v. Pugh*, 2 Dowl. 360.

been commenced, he may, instead of giving a warrant of attorney or cognovit, consent to a judge's order to stay proceedings, on condition that final judgment should be signed if the debt and costs are not paid within a time specified. The judge has jurisdiction in such circumstances only on the consent of both parties.⁽¹⁾ A judge's order is not a cognovit within the 1 & 2 Vict. c. 110, s. 9, and requires no stamp.⁽²⁾ Such order may be set aside by the judge under special circumstances; ⁽³⁾ also if there has been fraud.⁽⁴⁾ It is not impliedly revoked by the defendant, a female, marrying.⁽⁵⁾ One partner has no implied power from his co-partners to bind them in this way.⁽⁶⁾ "All written consents upon which orders for signing judgments are obtained shall be preserved in the chambers of the judges of the respective courts. In actions where the defendant has appeared by attorney, no such order shall be made, unless the consent of the defendant be given by his attorney or agent. Where the defendant has not appeared, or has appeared in person, no such order shall be made, unless the defendant attends the judge and gives his consent in person, or unless his written consent be attested by an attorney acting on his behalf, except in a case where the defendant is a barrister, conveyancer, special pleader, or attorney."⁽⁷⁾ The order does not operate as a stay of proceedings, unless it is so expressed.⁽⁸⁾

Judgment and execution.—Judgment may be signed if there is a default in paying the debt and costs, and the proceeding is the same as on cognovit.⁽⁹⁾ If no appearance has been entered by the defendant, the plaintiff must enter it for him before signing judgment,⁽¹⁰⁾ and it is an irregularity to omit this, though the irregularity may be waived, as by delivering a bill of costs without charging for that step.⁽¹¹⁾ The costs are taxed in the usual way, unless they

(1) *Norton v. Fraser*, 2 M. & Gr. 916; *Kirby v. Elkom*, 2 Dowl. 219; *Reynolds v. Sherwood*, 8 Dowl. 183.

(2) *Baker v. Flower*, 8 M. & W. 670; *Bray v. Manson*, *id.* 688; 9 Dowl. 748; *Thorne v. Neale*, 2 Q. B. 726.

(3) *Wade v. Simeon*, 13 M. & W. 647; 2 D. & L. 658.

(4) *Thorne v. Neale*, 2 Q. B. 726.

(5) *Thorpe v. Argles*, 1 D. & L. 831.

(6) *Hambridge v. De la Crouée*, 3 C. B. 742.

(7) Rules Pr. 155, 156, 157, H. T. 1853.

(8) *Michael v. Myers*, 6 M. & Gr. 702; *Filmer v. Burnby*, 2 M. & Gr. 529; 9 Dowl. 466.

(9) See *Bell v. Bidgood*, 8 C. B. 763; *Andrews v. Diggs*, 4 Exch. 827.

(10) *Hacklin v. Hassells*, 1 D. & L. 1006; 12 M. & W. 776.

(11) *Grandin v. Maddims*, 6 D. & L. 241.

are agreed to at the time.⁽¹⁾ No declaration to ground judgment is necessary or allowed on the taxation.⁽²⁾

Where defendant is insolvent trader.]—A consent to a judge's order, given by a trader within two months of the filing of a petition for adjudication, collusively and before any action is commenced, is null and void.⁽³⁾ So, if given by way of fraudulent preference, it is void against his assignees, if he afterwards become bankrupt.⁽⁴⁾ "Every judge's order made by consent, given after the commencement of this act by any trader defendant in any personal action, and whereby the plaintiff in such action shall be authorized forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action, and whether such order shall be made subject to any defeasance or condition, or not, in case the action in which such order shall be made shall be in the court of Queen's Bench, or in case the action wherein the same is made shall be in any other court, a true copy of such order shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the dockets and judgments in the said court of Queen's Bench, within twenty-one days after the making of the order, in like manner as a warrant of attorney in any personal action, and a *cognovit actionem* given by any defendant in any personal action, or copies thereof, and affidavits of the execution thereof respectively, may be filed with the said clerk within the space of twenty-one days after such warrant of attorney or *cognovit actionem* shall have been executed, otherwise such judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment shall be null and void to all intents and purposes⁽⁵⁾ whatever; and the provisions in 3 Geo. 4, c. 39, and 6 & 7 Vict. c. 66, for liberty to file warrants of attorney and cognovits, or copies thereof, with the clerk of the dockets and judgments, and for the said clerk to make certain entries and search in relation thereto, and for entering satisfaction thereon, and

(1) See *Deacon v. Alison*, 6 C. B. 434.

(2) Direct. Tax. 5 H. T. 1853. As to making a judge's order a rule of court, see post "Rules," *Gibbs v. Flight*, 13 C. B. 803; *Beames v. Farley*, 5 C. B. 178.

(3) 12 & 13 Vict. c. 106, s. 135, *ante*, p. 1009.

(4) *Ibid.* s. 133.

(5) *i. e.* against the assignees, *Bryan v. Child*, 5 Exch. 368.

for fees for search and filing and taking office copies shall extend and be applicable to every such judge's order in like manner as to warrants of attorney and cognovits mentioned in the said acts."⁽¹⁾ "The costs of filing a judge's order for judgment against a trader defendant under the Bankrupt Act shall not be allowed unless specially ordered by a judge."⁽²⁾

IV. JUDGMENT BY DEFAULT.

1. Judgment for want of plea. | 2. Setting aside.

For non-appearance.]—Where the writ of summons is specially indorsed and the defendant has failed to appear, the plaintiff may sign judgment as stated *ante*, p. 115. The defendant, however, may be let in to defend on application, supported by satisfactory affidavits; and it seems the ordinary affidavit of merits is sufficient, without stating the ground of defence;⁽³⁾ and it seems an affidavit in reply ought not to be received.⁽⁴⁾ Where there are several defendants, and some do not appear to a writ specially indorsed, see *ante*, p. 114.

Where the writ is not specially indorsed, and the defendant fails to appear, the plaintiff may sign judgment as stated *ante*, p. 116.

Where the defendant is a British subject and resides out of the jurisdiction, and has neglected to appear, judgment may also be signed as stated *ante*, p. 106, provided the plaintiff shall prove the amount of the debt or damage claimed, either before a jury upon a writ of inquiry, or before one of the Masters of the superior courts, according to the nature of the case; and the making such proof shall be a condition precedent to his obtaining judgment.⁽⁵⁾ So as to a writ served on a foreigner residing out of the jurisdiction.⁽⁶⁾

For want of a pleading, &c.]—When the defendant fails

(¹) 12 & 13 Vict. c. 106, s. 137; *Farrow v. Mayes*, 13 Q. B. 516. See, as to an insolvent consenting to a judge's order, *Viner v. Hawkins*, 9 Exch. 266.

(²) Rule Pr. 28, H. T. 1853.

(³) *Warrington v. Leake*, 11 Exch. 304. See also *Hall v. Scotson*, 9 Exch. 238.

(⁴) *Ibid.*

(⁵) C. L. P. Act, 1852, s. 18.

(⁶) *Ibid.* s. 19.

to plead properly within the time allowed for doing so, the plaintiff may sign judgment for want of a plea. So, if the defendant fail to rejoin, &c.⁽¹⁾ So, if the plaintiff do not reply, surrejoin, &c., the defendant may sign a judgment of *non pros.*⁽²⁾

Signing judgment, &c.—The judgment by default is final or interlocutory, according to the nature of the case; thus, it is final where the plaintiff seeks to recover a debt or liquidated demand in money.⁽³⁾ It is interlocutory where the action is to recover unliquidated damages. In the latter case an *incipitur* of the declaration on paper is taken to the office of the court to be stamped, after which a reference to the Master or a writ of inquiry must be sued out, as mentioned *post*.

If the judgment has been irregularly signed, the court or a judge may set it aside if prompt application be made by the defendant, and if the irregularity has not been waived.⁽⁴⁾ The plaintiff, on finding he has signed judgment irregularly, may abandon it, and give notice thereof to the defendant,⁽⁵⁾ or may obtain a rule nisi to set it aside,⁽⁶⁾ which rule has been made absolute on application a reasonable time even after satisfaction, and on the defendant being put in the same position.⁽⁷⁾

Even if the judgment has been regularly signed, the court has a discretion as to setting it aside on an application supported by an affidavit of merits.⁽⁸⁾ In general, the court refuses to do so if the effect will be to give an unjust advantage to the defendant, as to let him plead matter not belonging to the merits,⁽⁹⁾ or of mere nicety or technicality,⁽¹⁰⁾ or to let him plead after declining a reasonable offer of compromise.⁽¹¹⁾ The defendant has not been refused

(1) See *ante*, pp. 196, 206.

(2) See *ante*, pp. 201, 859.

(3) C. L. P. Act, 1852, s. 93.

(4) See *post*, "Setting aside proceedings."

(5) *Robinson v. Studdart*, 5 Dowl. 266.

(6) *Bennet v. Simmons*, 2 D. & L. 98; *Doe d. Gretton v. Roe*, 4 C. B. 576.

(7) *Cannan v. Reynolds*, 5 E. & B. 301.

(8) *Wood v. Cleveland*, 2 Salk. 518; 1 Salk. 402; *Forbes v. Middleton*, 2 Str. 1242.

(9) *Willet v. Atherton*, 1 W. Bl. 35.

(10) *Beck v. Mordaunt*, 2 Bing. N. C. 140; 4 Dowl. 112.

(11) *Anon.* 4 Taunt. 885.

the application however, though he intended to plead the Statute of Limitations,⁽¹⁾ or bankruptcy,⁽²⁾ or infancy.⁽³⁾ The affidavit of merits must be express,⁽⁴⁾ and by some one, *ex facie*, acquainted with the case.⁽⁵⁾ Various affidavits have been held insufficient for not stating expressly that the defendant has a good defence to the action upon the merits.⁽⁶⁾ The affidavit of the attorney states that he is "informed" or "instructed and verily believes."⁽⁷⁾ The plaintiff is not allowed to contradict the defendant's affidavits as to merits.⁽⁸⁾ A regular judgment is generally set aside on terms, as on defendant paying the costs of the application,⁽⁹⁾ taking short notice of trial,⁽¹⁰⁾ or paying the money into court.⁽¹¹⁾

Interlocutory judgment.]—Where the judgment is merely interlocutory, the amount of damages must be ascertained either by a reference to the Master, or a writ of inquiry. In actions of debt on a bond for the performance of covenants within 8 & 9 Will. 3, c. 11, s. 8, if judgment go by default, though it is in form entered up for the entire penalty, still the plaintiff cannot sue out execution for that amount, but must suggest breaches from time to time on the roll, and execute a writ of inquiry as stated *post*, p. 1034. When judgment passes by default as to part, and issue is joined on other pleas, the jury, at the trial, assess damages on the whole. It is the same, if there was a joinder in demurrer as to part;⁽¹²⁾ or, if the plaintiff has obtained judgment on the demurrer, he may enter a *nolle prosequi* as to the rest, and proceed by reference or inquiry as to the demurrer.⁽¹³⁾

(1) *Maddocks v. Holmes*, 1 B. & P. 228.

(2) *Evans v. Gill*, 1 B. & P. 52.

(3) *Delafield v. Tanner*, 5 Taunt. 856; 1 Marsh. 391.

(4) *Lane v. Isaacs*, 3 Dowl. 352.

(5) *Rowbotham v. Dupree*, 5 Dowl. 557.

(6) See *Bower v. Kemp*, 1 Dowl. 282; *Lane v. Isaacs*, 3 Dowl. 652; *Page v. South*, 7 Dowl. 412; *Pringle v. Marsack*, 1 D. & R. 155; *Crossly v. Innes*, 5 Dowl. 566.

(7) *Bromley v. Gerish*, 6 M. & Gr. 750; 1 D. & L. 768; *Schofield v. Huggins*, 3 Dowl. 427.

(8) *Deane v. Battersby*, 3 Dowl. 213.

(9) *Sisted v. Lee*, 1 Salk. 402; *Smith v. Blundell*, 1 Chitt. R. 226, 232; *Prudhoe v. Armstrong*, Barnes, 256.

(10) *Matthews v. Stone*, Barnes, 242.

(11) *Welland v. Rock*, Barnes, 243; *Wade v. Simeon*, 2 C. B. 548.

(12) *Codrington v. Lloyd*, 8 A. & E. 449.

(13) *Fleming v. Langton*, 1 Str. 532; *Duperoy v. Johnson*, 7 T. R. 473; *Bowden v. Horne*, 7 Bing. 716.

Where some of the defendants let judgment go by default and others go to trial, the jury assess the damages as to all,⁽¹⁾ unless the plea of one enures to all, as is generally the case in actions *ex contractu*, though not in actions *ex delicto*.⁽²⁾ A writ of inquiry may be obtained where contingent damages have been omitted to be assessed by the jury, and generally in all cases where the old writ of attaint would not lie.⁽³⁾

V. REFERENCE TO A MASTER.

The rule to compute is now abolished.⁽⁴⁾ "In actions in which it shall appear to the court or a judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the court or a judge may direct that the amount for which final judgment is to be signed shall be ascertained by one of the Masters of the said court, and the attendance of witnesses and the production of documents before such Master may be compelled by subpoena, in the same manner as before a jury upon a writ of inquiry, and it shall be lawful for such Master to adjourn the inquiry from time to time as occasion may require; and the Master shall indorse upon the rule or order for referring the amount of damages to him the amount found by him, and shall deliver the rule or order with such indorsement to the plaintiff, and such and the like proceedings may thereupon be had as to taxation of costs, signing judgment and otherwise, as upon the finding of a jury upon a writ of inquiry."⁽⁵⁾ The application in ordinary cases is generally made to a judge at chambers for a summons *nisi*, and after it is served and the order made, the plaintiff's attorney obtains an appointment with the Master, which is served on the defendant's attorney, or one of them,⁽⁶⁾ and the parties then attend with their witnesses; and on the same occasion the

(1) 11 Rep. 5; *Dicker v. Adams*, 2 B. & P. 163.

(2) *Morgan v. Edwards*, 6 Taunt. 398; *Hannay v. Smith*, 3 T. R. 662; *Jones v. Harris*, 2 Str. 1101; *id.* 1222.

(3) *Eichorn v. Le Maitre*, 2 Wils. 367; *Kinaston v. Mayor of Shrewsbury*, Hardr. 295. An attaint was a mode of reviewing the proceedings of a jury, now long superseded by the practice of granting new trials on motion, and expressly abolished by 6 Geo. 4, c. 50, s. 60.

(4) C. L. P. Act, 1852, s. 92.

(5) *Ibid.* s. 94.

(6) *Amlot v. Evans*, 7 M. & W. 462; 9 Dowl. 219; *Carter v. Southall*, 3 M. & W. 128; *Ettison v. Wood*, 21 L. J. 317, Q. B.

Master taxes the costs. If the application be opposed, the defendant must do so by seeking to set aside the judgment, for which purpose he may ask to have the rule enlarged, for he cannot show as cause the irregularity of the judgment.⁽¹⁾ Nor is it cause, that a bill in equity has been filed against the plaintiff.⁽²⁾ When a rule to set aside the judgment has been granted with a stay of proceedings, the rule, or order for a reference, cannot be made absolute.⁽³⁾ When several defendants have allowed judgment against them by default, at different times, one reference only should be applied for, and that after the last judgment is signed.⁽⁴⁾

“On a reference to the Master to ascertain the amount for which final judgment is to be signed, the Master’s certificate shall be filed in the office when judgment is signed.”⁽⁵⁾

VI. WRIT OF INQUIRY.

- | | |
|----------------------------|-------------------|
| 1. In what cases. | 4. Setting aside. |
| 2. Form, and how sued out. | 5. Judgment. |
| 3. Notice and trial. | |

The writ of inquiry is generally directed to the sheriff of the county in the venue, and is executed by him or his deputy;⁽⁶⁾ but it may be also, under special circumstances and in nice questions, directed to a judge of assize, in which case the latter will act merely as an assessor or assistant of the sheriff.⁽⁷⁾ It may also be ordered to be tried in another venue, if the action is local.⁽⁸⁾ It is tested on the day on which it is issued, and it may be made returnable on any day certain, in term or vacation.⁽⁹⁾ All the defendants must be mentioned in the writ, and the damages

(1) *Luxford v. Groombridge*, 2 Dowl. N. S. 332; *Kelly v. Villebois*, 8 Dowl. 136; *Middleton v. Woods*, 6 M. & W. 136; 8 Dowl. 170.

(2) *Berther v. Street*, 8 T. R. 326.

(3) *Anderson v. Southern*, 9 Dowl. 994; *Trego v. Tatham*, 2 Sc. N. R. 537; 9 Dowl. 379.

(4) *Field v. Pouley*, 3 M. & Gr. 756; 5 Sc. N. R. 524.

(5) Rule Pr. 171, H. T. 1853.

(6) *Wallace v. Humes*, Barnes, 231, 232; *Denny v. Trapnell*, 2 Wils. 378; *R. v. Sheffield Railway Company*, 11 A. & E. 2.

(7) *Anon.* 12 Mod. 609; 1 Sellen, 344; *Waite v. Swales*, Barnes, 135.

(8) 3 & 4 Will. 4, c 42, s. 22; *ante*, p. 876.

(9) 1 Will. 4, c. 7, s. 1; 2 Will. 4, c. 39, ss. 11, 12; *Collett v. Curling*, 5 D. & L. 605.

assessed against them jointly.⁽¹⁾ "There shall be no rule for the sheriff to return a good jury upon a writ of inquiry, but an order shall be made by a judge upon summons for that purpose."⁽²⁾ The costs of the jury are costs in the cause.⁽³⁾

The writ is engrossed on parchment, and stamped at the Master's office. The day on which it is to be executed must be indorsed on it. Where it is to be executed in the country, it must, two days at least before the day appointed, be left at the sheriff's or deputy-sheriff's office; if in London or Middlesex, it must be left, one day at least before, at the sheriff's office (or, if in London, at the secondary's office, Basinghall-street).

The following is the usual

Form of Writ of Inquiry.

VICTORIA, &c. To the sheriff of greeting : Whereas A. B., lately in our court of , sued C. D., and declared against him for , [state substance of declaration] and the said A. B. claimed £ . And such proceedings were thereupon had in our said court, that the said A. B. ought to recover against the said C. D. his damages on occasion of the premises. But because it is unknown to our said court what damages the said A. B. hath sustained in that behalf, therefore we command you that by the oath of twelve good and lawful men of your bailiwick you diligently inquire what damages the said A. B. hath sustained, as well on occasion of the premises aforesaid as for his costs of suit in this behalf, and that you send to us [or "our justices," or "the barons of our Exchequer"] at Westminster, on the day of , now next ensuing, the inquisition which you shall thereupon take under your seal, and the seals of those by whose oath you shall take that inquisition, together with this writ. Witness, , [chief of court] at Westminster, the day of in the year of our Lord 18 .

Notice of inquiry.—A notice of inquiry must be in writing, and is served in the same way as a notice of trial.⁽⁴⁾ Notice must be given ten days before; and short notice, four days. Countermand of notice may be given four days or two days respectively before the day appointed; and so as to continuance of notice. The notice specifies some day and hour at which the inquiry is to take place, which day is before the day fixed for the return. The

⁽¹⁾ *Mitchell v. Milbank*, 6 T. R. 199; *Field v. Pooley*, 3 M. & Gr. 756.

⁽²⁾ Rule Pr. 46, H. T. 1853.

⁽³⁾ *Wilkinson v. Malin*, 1 Dowl. 630.

⁽⁴⁾ See ante, p. 212, et seq.

hour should be precisely stated in trials before the sheriff; thus, it is not enough to say, "by ten o'clock,"⁽¹⁾ or "at ten or as soon after as the sheriff can attend,"⁽²⁾ or "between ten and two."⁽³⁾ In such cases, however, and where the day of the month is misstated, the court may refuse to set aside the proceedings, unless the defendant swears he was misled.⁽⁴⁾ In general, it is stated that the writ will be executed between the hours of eleven and one o'clock in the forenoon. When the writ is executed by a judge of assize, no hour is specified. Costs of the day are incurred, if the plaintiff does not proceed to trial pursuant to his notice, as in ordinary trials. The same observations apply to an irregularity in the notice of inquiry as to an irregularity in the notice of trial.⁽⁵⁾

Form of Notice of Inquiry.

In the Q. B. ["C. P.," or "Exch. of P."]

Between A. B., plaintiff,
and

C. D., defendant.

Take notice that a writ of inquiry of damages in this cause will be executed on the day of next, [or instant] between the hours of eleven of the forenoon and one of the clock in the afternoon, at the secondaries office, No. 5, Basinghall-street, in the city of London, [or at the sheriff's office, in Red Lion Square, Holborn, in the county of Middlesex, or at the house , commonly called by the name or sign of , in street, in the county of , or at the next assizes, &c., (as in notice of trial)] [when and where counsel will attend on the part of the said plaintiff.]

Executing the writ.—When counsel attend, notice in writing should be given to the other side, otherwise the sheriff may postpone the trial.⁽⁶⁾ It is in the sheriff's discretion to allow costs of the attendance of counsel.⁽⁷⁾ The trial is conducted in nearly the same manner as at *nisi prius*. The jurors cannot be challenged.⁽⁸⁾ The sheriff must

(1) *Ison v. Fowen*, 2 Str. 1142.

(2) *Hannaford v. Holman*, Barnes, 295.

(3) *Foster v. Smales*, Barnes, 295; *id.* 296.

(4) *Eldan v. Haig*, 1 Chitt. R. 11; *id.* 5; *Batten v. Harrison*, 3 B. & P. 1.

(5) See *ante*, p. 221.

(6) *Elliot v. Micklin*, 5 Price, 641; *Coleman v. Mawby*, 2 Str. 853; *id.* 1259.

(7) Tidd, 80, (9th edit.)

(8) *Anon.* 3 Salk. 81.

execute the writ at the time appointed, and is not allowed to apply to stay the execution.⁽¹⁾ The defendant is bound to attend at the hour mentioned in the notice, and to remain till the preceding business is disposed of.⁽²⁾ The defendant can only at the inquiry dispute the amount of damages; for the right to some damages is held established by the judgment.⁽³⁾ So if a deed or bill of exchange was declared on, it need not be proved.⁽⁴⁾ In an action for mesne profits he should, however, prove the length of time the defendant had been in possession.⁽⁵⁾ So in an action on a policy of insurance, the plaintiff need not prove an interest in it;⁽⁶⁾ and in slander the jury may, without any evidence, give what damages are suitable.⁽⁷⁾ On the other hand, the defendant is precluded from proving any matter which might have been pleaded as a defence;⁽⁸⁾ as fraud in the contract;⁽⁹⁾ or want of consideration;⁽¹⁰⁾ or of stamp;⁽¹¹⁾ or a payment,⁽¹²⁾ or a set-off.⁽¹³⁾ Where, however, the declaration is general, the defendant may sometimes be allowed to prove facts, the effect of which must be rebutted by the plaintiff; as that all the work done was not done at defendant's request;⁽¹⁴⁾ that the house in use and occupation was not occupied by the defendant.⁽¹⁵⁾ The jury may also assess interest as damages, as is done at *nisi prius*.⁽¹⁶⁾

Return of inquisition.—When the trial is over, the sheriff indorses his return on the writ, which is delivered out to

(1) *Stockdale v. Hansard*, 8 Dowl. 148.

(2) *Williams v. Frith*, 1 Doug. 198; Lloft, 193.

(3) *De Gaillon v. L'Aigle*, 1 B. & P. 368; *Eadem v. Lutman*, 1 Str. 612.

(4) *Collins v. Bybot*, 1 Esp. 157; *Lane v. Mullins*, 2 Q. B. 254; *Cooper v. Blick*, 2 Q. B. 915; *Green v. Hearne*, 3 T. R. 301.

(5) *Ive v. Scott*, 9 Dowl. 993.

(6) *Thellusson v. Fletcher*, 1 Esp. 73; 1 Doug. 316.

(7) *Tripp v. Thomas*, 3 B. & C. 427; 5 D. & R. 276.

(8) *Speck v. Phillips*, 5 M. & W. 279; 7 Dowl. 470.

(9) *Eadem v. Lutman*, 1 Str. 612.

(10) *Shepherd v. Chester*, 4 T. R. 275.

(11) *Watson v. Glover*, 12 L. J. 184, C. P.

(12) *Lane v. Mullins*, 2 Q. B. 254; 1 Dowl. N. S. 562.

(13) *Carruthers v. Graham*, 14 East, 78.

(14) *Williams v. Cooper*, 3 Dowl. 204.

(15) *Davis v. Holship*, 1 Chitt. R. 644; see also, as to a sum due on a special count, *King v. Beck*, 8 Dowl. 735; *Cooper v. Blick*, 2 Q. B. 915; *Banbury Union v. Robinson*, 1 Dav. & M. 42.

(16) See *ante*, p. 361.

the party four days afterwards with the inquisition, which is engrossed on parchment and signed and sealed in the name of the sheriff and jurors. The defendant can insist on the inquisition being filed, and compel the plaintiff, by rule of court, to deliver it up for the purpose.⁽¹⁾ The court will, if necessary, grant a rule absolute in the first instance, to compel the sheriff to return the writ.⁽²⁾

Setting aside verdict.—As in the case of verdicts at *nisi prius*, the defendant may, within four days after the return day of the writ, move to set aside the execution of the writ, or arrest judgment and grant a new writ of inquiry,⁽³⁾ and the sheriff or officer may stay execution for that purpose, or prevent judgment being signed. If, however, the execution be not set aside, the judgment is entered up as of the return day.⁽⁴⁾ Where the sheriff has power to certify, the undersheriff signs the certificate in the sheriff's name.⁽⁵⁾

Signing judgment.—If there is no stay of judgment and execution, and no rule for a new inquiry, &c., has been moved for, "judgment may be signed at the expiration of four days from the return of a writ of inquiry."⁽⁶⁾ The costs may, in certain cases, be taxed on the reduced scale.⁽⁷⁾ Execution is the same as in ordinary cases.

Writ of inquiry in debt on bond.—The statute 8 & 9 Will. 3, c. 11, was passed to prevent a plaintiff, who sues on a bond with a penalty, from recovering greater damages than are actually incurred, and allows him to suggest breaches from time to time.⁽⁸⁾ Section 8 enacts :—

In all actions which shall be commenced or prosecuted in any of Her Majesty's courts of record, upon any bond or bonds, or on any penal sum, for non-performance of any covenant or agreements in any

(1) *Townsend v. Burns*, 1 Dowl. 629 ; 1 Cr. & M. 176.

(2) *Stockdale v. Hansard*, 8 Dowl. 297.

(3) As to a bill of exceptions lying on a writ of inquiry, see *Price v. Green*, 16 M. & W. 346.

(4) 1 & 2 Will. 4, c. 7, s. 1 ; *Angel v. Ihler*, 5 M. & W. 600. As to the motion and producing the sheriff notes, verified by affidavit, see *ante*, p. 428.

(5) *Stroud v. Watts*, 2 C. B. 929 ; 3 D. & L. 799.

(6) Rule Pr. 55, H. T. 1855.

(7) See generally, as to costs in such cases, *ante*, pp. 448, 455, 461.

(8) *Steward v. Greaves*, 10 M. & W. 711. The Crown is not bound to follow the course pointed out by the act, *R. v. Peto*, 1 Y. & J. 171.

indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon trial of such action or actions, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches, so to be assigned, as the plaintiff, upon the trial of the issues, shall prove to have been broken; and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions. And if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit; upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize at *nisi prius* of that county, to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices or justice of assize or *nisi prius*, that he or they shall make return thereof to the court from whence the same shall issue at the time in such writ mentioned. And in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay into the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed, by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant shall be, thereupon, forthwith discharged from the said execution, which shall likewise be entered upon record. But, notwithstanding, in each case, such judgment shall remain, continue, and be as a further security to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained; upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre-tenants, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively, to show cause why execution should not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches or inquiry thereof, upon a writ to be awarded in manner as aforesaid; and that, upon payment or satisfaction in manner as aforesaid, of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."

Nothing in the Common Law Procedure Act, 1852, s. 96, affects the above act, "as to the assignment or suggestion of breaches, or as to judgment for a penalty as a security for damages in respect of further breaches."

Though, in difficult cases, the court will order the inquiry to take place before a judge of assize, ⁽¹⁾ the statute 3 & 4 Will. 4, c. 42, s. 16, enacts, as to ordinary cases:—

"All writs issued under 8 & 9 Will. 3, c. 11, shall, unless the court where such action is pending, or a judge of one of the said superior courts, shall otherwise order, direct the sheriff of the county where the action shall be brought to summon a jury to appear before such sheriff, instead of the justices of assize or *nisi prius* of that county, to inquire of the truth of the breaches suggested and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the court from whence the same shall issue at a day certain, in term or vacation."

The statute is confined to actions of debt.⁽²⁾ It applies to bonds for the payment of an annuity⁽³⁾ or of money by instalments,⁽⁴⁾ or for the performance of an award,⁽⁵⁾ though the covenant be in different deeds or writings,⁽⁶⁾ or though the written instruments are not under seal.⁽⁷⁾ But the statute does not apply where the damages could be calculated so as to meet the entire condition of the bond, as in *post obit* bonds,⁽⁸⁾ nor does it apply to bail-bonds or *replevin* bonds, where complete justice can be done by a court of law;⁽⁹⁾ nor to bonds for paying by instalments, and on one default the whole becoming due;⁽¹⁰⁾ nor to warrants of attorney to pay by instalments, though a bond is also

⁽¹⁾ *Archbishop of Canterbury v. Burlington*, 1 Dowl. N. S. 285.

⁽²⁾ 1 Saund. 58 b, n.

⁽³⁾ *Walcott v. Goulding*, 8 T. R. 126.

⁽⁴⁾ *Willoughby v. Swinton*, 6 East, 550.

⁽⁵⁾ *Welch v. Ireland*, 6 East, 613; *Handbury v. Guest*, 14 East, 401.

⁽⁶⁾ *Collins v. Collins*, 2 Burr. 824; *Hurst v. Jennings*, 5 B. & C. 650; 8 D. & R. 424.

⁽⁷⁾ *Drage v. Brand*, 2 Wils. 377.

⁽⁸⁾ *Murray v. Earl Stair*, 2 B. & C. 82; 3 D. & R. 278; *Smith v. Bond*, 10 Bing. 125; 3 M. & Sc. 528.

⁽⁹⁾ *Moody v. Pheasant*, 2 B. & P. 446; *Middleton v. Bryan*, 3 M. & Sel. 155; 2 Saund. 187, n. (2).

⁽¹⁰⁾ *James v. Thomas*, 5 B. & Ad. 40; 2 N. & M. 663; *Kepp v. Wiggett*, 4 C. B. 678; *Hodgkinson v. Wyatt*, 1 D. & L. 668.

given.⁽¹⁾ The defendant cannot be made to pay more than the penalty and costs,⁽²⁾ except where the action is on another instrument than a bond, in which case damages beyond the penalty may be added.⁽³⁾ Interest may, however, be given as damages in an action on a judgment recovered on a bond.⁽⁴⁾

Before the writ of inquiry is sued out, the proceedings must be entered on the roll and breaches suggested, unless the declaration has already suggested them.⁽⁵⁾ A copy of the breaches is then served on the defendant,⁽⁶⁾ or his attorney, and notice of inquiry given. The writ of inquiry is then sued out and left with the sheriff, as stated *ante*, p. 1031.

Form of Entry where the Breaches are assigned in the Pleadings.

— Wherefore the plaintiff ought to recover against the defendant his said debt, and also his damages which he hath sustained, as well on occasion of the detaining thereof as for his costs of suit in this behalf : but because it is convenient and necessary that final judgment of and upon the premises aforesaid should not be given until such time as the truth of the said breaches above assigned shall have been inquired into, and the damages by the plaintiff sustained by reason of the said breaches shall have been assessed by a jury of the country in that behalf, according to the statute in such case made and provided, let the giving of judgment hereupon be stayed until such time accordingly. And the plaintiff, having prayed the writ of our Lady the Queen, to be directed to the sheriff of _____, [and to the Right Hon. _____ (chief justice or baron, &c.), or, and to her Majesty's justices assigned to take the assizes in the said county], to inquire by a jury of the said county of the truth of the aforesaid breaches, and to assess the damages which the plaintiff hath sustained thereby ; therefore, according to the said statute, the sheriff is commanded, that by twelve free and lawful men of his county, duly qualified according to law, who are nowise akin to the plaintiff or defendant [or, that he summon twelve good and lawful men of his bailiwick to appear before the said chief justice, &c., on, &c., at, &c., to inquire], he do inquire diligently, on their oath, of the truth of the said breaches of the said condition,

(1) *Cox v. Rodbard*, 3 Taunt. 74 ; *James v. Thomas*, 5 B. & Ad. 41 ; *Shaw v. Worcester*, 6 Bing. 385 ; *Austerbury v. Morgan*, 2 Taunt. 195.

(2) *Branscombe v. Scarborough*, 6 Q. B. 13.

(3) *Harrison v. Wright*, 13 East, 343.

(4) *Maclure v. Dankin*, 1 East, 436.

(5) See *Lawes v. Shaw*, 5 Q. B. 322.

(6) The defendant cannot plead or demur to the breaches suggested, 1 Saund. 58 f. n.

and to assess the damages which the plaintiff hath sustained thereby; and that the said sheriff do send the inquisition, which he shall thereupon take [or, and that the said sheriff have, on that day, before the said (chief justice, &c.), the writ of our said Lady the Queen, to him in that behalf directed. It is likewise commanded to the said (chief justice), that he certify the inquisition before him] to our said Lady the Queen, at Westminster [or in C. P., to the justices here, or in Exch., to the barons here], on the day of instant, under his seal and the seals of [or, together with the names of] those by whose oath such inquisition shall be taken, together with the writ of our said Lady the Queen, to him thereupon directed [or, and that the said chief justice also have there then that writ]; the same day is given to the plaintiff at the same place.

Form of Entry when the Breach is suggested after the Judgment.

— Wherefore the plaintiff, &c., in this behalf. And hereupon the plaintiff, according to the statute in such case made and provided, suggests and gives the court here to understand and be informed, that the said bond was and is subject to a condition thereunder written, whereby, after reciting that (*state the recitals*), it was declared that the condition of the bond was such that if (*state the condition*.) Nevertheless for a breach of the said condition the plaintiff, according to the statute in such case made and provided, suggests and gives the court here to understand and be informed that the defendant did not nor would (*state the breach*.)

The plaintiff, at the inquiry, need not prove the breaches where they have been assigned in the declaration, though he must, if they have been suggested after judgment; and the defendant may dispute the breaches though he cannot offer evidence merely in excuse.⁽¹⁾ Where judgment has passed on demurrer, and the execution of an instrument has been alleged in his plea, the plaintiff need not, at the inquiry, prove it.⁽²⁾ But if the bond or instrument is not set forth in the pleadings, he must prove the bond and its identity.⁽³⁾ After trial, the inquisition and return are obtained, as stated *ante*, p. 1033. "At the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy, before whom such writ

⁽¹⁾ 1 Saund. 58 a; *Archbishop of Canterbury v. Robertson*, 1 Cr. & M. 690; *Barwise v. Russell*, 3 C. & P. 608.

⁽²⁾ *Collins v. Rybot*, 1 Esp. 157.

⁽³⁾ *Hodgkinson v. Marsden*, 2 Camp. 121; *Williamson v. Sills*, 2 Camp. 519; 1 Saund. 58 d.

of inquiry may be executed, or such sheriff, deputy, or judge before whom such trial shall be had, shall certify under his hand, upon such writ, that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new inquiry or trial, or a judge of any of the said courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order."⁽¹⁾

Form of Judgment.

— At which day come here, as well the plaintiff as the defendant, by their respective attorneys aforesaid [*or, comes here the plaintiff, by his attorney aforesaid*], and the said sheriff to wit, S. S., Esq. sheriff of [*or chief justice, &c.*], now here returns a certain inquisition indented [and annexed to the said writ] taken before him [*or them*] at , in the county aforesaid, on , by virtue of the said writ, by the oath of twelve good and lawful men of the said county of , by which it is found that the breach of the condition of the said bond, in the said writ mentioned, is true (*or other finding*), and that the plaintiff hath sustained damages by reason thereof to £ , over and above his costs of suit in that behalf, and for those costs to 40s. Therefore it is considered that the plaintiff do recover against the defendant his said debt, and also one shilling for his damages which he hath sustained on occasion of the detention thereof. It is also considered that the plaintiff do recover against the defendant his costs aforesaid, by the said inquisition above found, and also £ for his costs of suit, by the court here adjudged, of increase to the plaintiff, which said debt, damages, and costs in the whole amount to £ . It is also considered that the said plaintiff have execution against the defendant of the damages aforesaid to £ by the said inquisition above found, by reason of the said breaches of the said condition, together with the said costs so thereby also found, and the said costs of increase, according to the said statute in such case made and provided.

Writ of inquiry not after judgment by default.—When judgment is entered after demurrer or issue of *nul tiel record*, the proceedings are the same as where there is judgment by default. When issue is joined it is made up and delivered as in ordinary cases, without any special award of a jury, when the declaration sets out the condition of the bond and has the breaches assigned,⁽²⁾ or, though not setting these out, when the plea makes it necessary in the

⁽¹⁾ 3 & 4 Will. 4, c. 42, s. 18.

⁽²⁾ *Quin v. King*, 1 M. & W. 42.

replication to assign a breach.⁽¹⁾ Where to a general declaration a plea of *non est factum*, or *non est factum* and fraud is pleaded, the plaintiff may join issue, but he must enter a separate suggestion of breaches under the statute, and cannot, in the same replication, include both; ⁽²⁾ and the award of a jury must be to try the issue and assess damages on the breach suggested.⁽³⁾ The proceedings at the inquisition are the same as when judgment has passed by default.

Scire facias for further breaches.]—When further breaches are made after the inquisition, there must be a *scire facias* which recites the proceedings in the former action sufficient to show a warrant for the judgment, and then suggests the further breaches, or sets forth covenants not formerly included in the original action, and assigns breaches on them. If, however, the breach could have been assigned in the original action, it cannot be suggested in the *scire facias*.⁽⁴⁾ The defendant pleads to the *scire facias* or makes default; and, if the latter, the plaintiff must again issue a writ of inquiry. The plaintiff, on an award of execution, is entitled to his costs on the *scire facias*.⁽⁵⁾

(1) *Roakes v. Manser*, 1 C. B. 531; 3 D. & L. 17; *Webb v. James*, 6 M. & W. 645; 1 Dowl. N. S. 36; *Scott v. Staley*, 4 Bing. N. C. 724; 6 Dowl. 714.

(2) 2 Saund. 187 e.; *Ethersey v. Jackson*, 8 T. R. 255; *Homfray v. Rigby*, 5 M. & Sel. 60.

(3) *Quin v. King*, 1 M. & W. 42; *Scott v. Staley*, 4 Bing. N. C. 724; *Ethersey v. Jackson*, 8 T. R. 255. A judge's order may be obtained to re-deliver a fresh issue including the suggestion, *ibid.*

(4) *Harrass v. Armitage*, 12 Price, 441; 13 Price, 715.

(5) 3 & 4 Will. 4, c. 42, s. 34.

CHAPTER XXXV.

MANDAMUS—INJUNCTION—EQUITABLE DEFENCES.

[This Chapter will be found at the end of the Volume for the convenience of including the latest decisions.]

CHAPTER XXXVI.

STAYING PROCEEDINGS.

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| 1. In what cases. | 6. Actions against good faith, or without authority. |
| 2. Where amount of debt is disputed. | 7. Actions contrary to rule or order of court. |
| 3. On paying debt without costs. | 8. Where criminal proceedings or error is brought. |
| 4. Where a second action is brought. | 9. Effect of rule staying proceedings. |
| 5. In trifling actions. | |

1. *In what cases.*]—When a writ of summons is issued and served on a defendant for the payment of any debt and damages, the defendant can always, within four days, pay the debt and costs, whereupon the proceedings will be stayed.⁽¹⁾ If the four days are past, he can only apply at chambers for a judge's order to stay on payment of the debt and costs up to the time of the application. The costs must in that case be taxed, unless the parties agree upon a sum. The defendant cannot obtain a stay of proceedings in any case after the four days, as a matter of right, as the court or a judge exercises a discretion, and therefore may impose terms. The court has no power to order a stay on payment at a future day; and hence the plaintiff's consent must be obtained before such order can be made.⁽²⁾ If the order be that there shall be a stay on payment of debt and costs within a certain time, the plaintiff

⁽¹⁾ C. L. P. Act, 1852, s. 8; *ante*, pp. 88 to 90.

⁽²⁾ *Norton v. Fraser*, 2 M. & Gr. 916; 3 Sc. N. R. 293; *Filmer v. Burnby*, 2 M. & Gr. 529; *Michael v. Myers*, 6 M. & Gr. 702.

is not prevented from going on with the action, if the payment is not made, for he could not obtain an attachment ;⁽¹⁾ the order should therefore be drawn up so as to make the defendant absolutely to pay the debt and costs, in which case an attachment may be had.⁽²⁾ The defendant may obtain a stay as to one or more counts of a declaration, leaving the plaintiff to proceed or not as to the others. The court will not stay proceedings on a mere affidavit that no debt is due, or that there is no cause of action ;⁽³⁾ nor on an affidavit of a mere equitable defence.⁽⁴⁾

Where the action, therefore, is for a *liquidated demand*, the defendant may obtain a judge's order to stay on payment of debt and costs,⁽⁵⁾ as in debt on a judgment ;⁽⁶⁾ or for rent ;⁽⁷⁾ or for a penalty under a statute.⁽⁸⁾ "In any action against an acceptor of a bill of exchange, or the maker of a promissory note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only."⁽⁹⁾ So an indorser may obtain a stay ;⁽¹⁰⁾ but he cannot afterwards recover the costs paid against the acceptor.⁽¹¹⁾ The plaintiff who has brought several actions on a bill, and is paid the debt and costs in one, can proceed with the other actions for costs.⁽¹²⁾ Where a bond has a condition or defeasance making the same void on payment of a lesser sum at a day or place certain, "if at any time pending an action on such bond with a penalty, the defendant shall bring into the court where the action shall be depending, all the principal money and interest ⁽¹³⁾ due ⁽¹⁴⁾ on such bond, and also all such costs as have been expended in any suit or suits in law or equity upon such bond, the

(1) *Smith v. Smith*, 2 N. R. 473 ; *Fricker v. Eastman* 11 East, 319 ; *Hand v. Dinely*, 2 Str. 1220.

(2) *Ibid.* ; *Scurrall v. Horton*, Barnes, 283.

(3) *Smith v. Curtis*, 2 Dowl. 223 ; *Sherwood v. Benson*, 4 Taunt. 631.

(4) *Barlow v. Leeds*, 5 N. & M. 426 ; *Steel v. Bradfield*, 4 Taunt. 227 ; *Jones v. Bramwell*, 3 Dowl. 483 ; *Vandersteyn v. William* 6 M. & W. 457 ; 8 Dowl. 369.

(5) *Gibbon v. Copeman*, 5 Taunt. 840.

(6) *Simpson v. Stone*, 2 W. Bl. 785.

(7) *Lee v. Irish*, Hardr. 173.

(8) *Webb v. Punter*, 2 Str. 1217 ; *Stock v. Eagle*, 2 W. Bl. 1052

(9) Rule Pr. 24, H. T. 1853.

(10) *Smith v. Dudley*, 4 T. R. 691.

(11) *Dawson v. Morgan*, 9 B. & C. 620.

(12) *Randall v. Moon*, 12 C. B. 261.

(13) *England v. Watson*, 9 M. & W. 333 ; 1 Dowl. N. S. 398.

(14) *Robinson v. Brown*, 3 C. B. 54.

said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly."⁽¹⁾ In actions on bonds for payment of an annuity, or of money by instalments, the defendant may also stay proceedings on payment of the arrears and costs after judgment, such judgment standing as security for future payments.⁽²⁾ Where, however, by the bond the whole becomes due on default as to one instalment, the court will not stay proceedings.⁽³⁾ Where an action was brought against a surety for a due accounting of moneys, he was not allowed to stay the action as to certain items in the particulars of demand. on payment of the amount of them into court.⁽⁴⁾ In the case of bonds for the payment of mortgage money, or performance of covenants in a mortgage deed, the court may stay proceedings on payment of principal and interest to the mortgagee or into court.⁽⁵⁾

Where the action is for *damages unliquidated*, the court will not in general stay proceedings on payment of a sum.⁽⁶⁾ Yet in an action of trespass for taking goods where no special damage was laid, the action has been stayed on the defendant restoring the goods or paying their full value with costs; ⁽⁷⁾ though it has been refused when the plaintiff could not thereby be put in the same situation as before.⁽⁸⁾ So a stay has been ordered in trover or detinue for goods or title deeds, where the damages are merely nominal.⁽⁹⁾ After a verdict in an action for unliquidated damages, the court will not interfere to stay proceedings on payment of

⁽¹⁾ 4 & 5 Anne, c. 16, ss. 12, 13. The court refers it to the Master to compute the principal and interest.

⁽²⁾ 8 & 9 Will. 3, c. 11, s. 8; *Vansandau v. ———*. 1 B. & Ald. 214.

⁽³⁾ *Gowlett v. Hanforth*, 2 W. Bl. 958; *Bonafous v. Rybot*, 3 Burr. 1374.

⁽⁴⁾ *Kepp v. Wiggett*, 4 C. B. 678.

⁽⁵⁾ 7 Geo. 2, c. 20, s. 1; *Berthen v. Street*, 8 T. R. 326; *Sutton v. Rawlings*, 3 Exch. 407; *Smeeton v. Collier*, 1 Exch. 457.

⁽⁶⁾ *Calvert v. Jolliffe*, 2 B. & Ad. 418; *Bernasconi v. Fairbrother*, 7 B. & C. 379.

⁽⁷⁾ *Pickering v. Trust*, 7 T. R. 53.

⁽⁸⁾ *Gibson v. Humphrey*, 2 Dowl. 68.

⁽⁹⁾ *Ibid.*; *Phillips v. Hayward*, 3 Dowl. 362; *Peacock v. Nicholls*, 8 Dowl. 367; *Lucas v. London Dock Company*, 4 B. & Ad. 378; *Coombe v. Sanson*, 1 D. & B. 201; *Yates v. Dublin Packet Company*, 6 M. & W. 77.

the sum recovered and costs, or prevent the plaintiff signing final judgment.⁽¹⁾

In some cases also the court is authorized *by statute* to stay actions, as where a bailiff of the county court is sued for taking goods in execution claimed by a third party, there being a mode of interpleading in such cases in the county court.⁽²⁾ So where the defendant obtains an interpleader in case of adverse claims.⁽³⁾

2. *Payment of debt and costs when the amount is disputed.*]
—Sometimes the defendant may be willing to pay what he considers to be the debt and costs, but which the plaintiff considers insufficient; in such cases the defendant should pay the sum into court, or, if he cannot do so, should allow judgment by default as to the amount and defend as to the rest; or he may obtain a judge's order, calling on the plaintiff to show cause why on payment of a certain sum all proceedings should not be stayed. Thus, if the plaintiff sue for an account, part of which has been paid, but not credited in the particulars, the defendant may obtain a stay on payment of the balance and costs. It is not enough merely to offer that sum, but a judge's summons should be obtained.⁽⁴⁾ If on attending the summons the plaintiff refuse to receive the lesser sum, the judge will indorse such refusal; and if the defendant afterwards pay the amount into court, when that can be done, or in other cases without that, he will be entitled to his subsequent costs on the plaintiff's failing to recover more.⁽⁵⁾ It is for the Master to allow the defendant's costs in these circumstances; ⁽⁶⁾ and if the Master refuses so to tax them, a rule or order to review his taxation may be applied for,⁽⁷⁾ and will be made absolute, unless

⁽¹⁾ *Peat v. Magnall*, 6 D. & L. 261.

⁽²⁾ 9 & 10 Vict. c. 95, s. 118; see *Mann v. Buckerfield*, 2 L. M. & P. 55; *Tinkler v. Hilder*, 4 Exch. 187; *Jessop v. Crawley*, 15 Q. B. 212; *Cater v. Chignell*, 15 Q. B. 217.

⁽³⁾ See *ante*, p. 919; see as to staying actions for publishing, Parliamentary Papers, 3 & 4 Vict. c. 9; *Stockdale v. Hansard*, 11 A. & E. 297; as to Winding-up Acts, *ante*, p. 759; as to actions on penal statutes, 36 Geo. 3, c. 104, s. 38; 44 Geo. 3, c. 98, s. 10.

⁽⁴⁾ *Saunderson v. Piper*, 7 Sc. 421; 7 Dowl. 632.

⁽⁵⁾ *Watson v. Coleman*, 7 M. & Gr. 422; *Clark v. Dann*, 3 D. & L. 513; *Gower v. Elkins*, 3 M. & W. 216; 6 Dowl. 335; *Fisher v. Pyne*, 1 M. & Gr. 265; *Shaw v. Hughes*, 15 C. B. 660; see *ante*, p. 915.

⁽⁶⁾ *Ros v. Cobham*, 6 Dowl. 628.

⁽⁷⁾ *Fletcher v. Tanner*, 3 C. B. 963.

the plaintiff can rebut the presumption of oppressive conduct.⁽¹⁾

3. *On payment of debt without costs.*—When the conduct of the plaintiff has been oppressive, the court may stay proceedings on payment of the debt without costs ; ⁽²⁾ as where the plaintiff, without making any previous demand, sued the sheriff, who had levied under a *fi. fa.*, for money had and received ; ⁽³⁾ or where the defendant paid the debt on application, without knowing that a writ had been issued, and the attorney proceeded for his costs.⁽⁴⁾ Where, however, the defendant led the attorney to believe he would pay him without a writ being issued, but did not pay, though he paid the plaintiff after the writ issued, and not knowing of the writ, the attorney was held entitled to go on with the action for his costs.⁽⁵⁾

4. *When a second action is brought.*—The court will often stay a second action, brought substantially by and against the same party and for the same cause, until the costs of the former are paid,⁽⁶⁾ unless the plaintiff is in prison for those costs,⁽⁷⁾ not having taken the benefit of the Insolvent Act.⁽⁸⁾ If, however, the costs are not paid, the court will not interfere further, nor allow the defendant to *non. pros.* the second action in case they are not paid before a certain day to be named.⁽⁹⁾ When the plaintiff was in prison under execution on a judgment obtained against him by the defendant for a larger amount, the latter was allowed to stay the action on setting off the plaintiff's demand against such former judgment.⁽¹⁰⁾ Where, however, an attorney, who had been sued for negligence, and a verdict

⁽¹⁾ *Gower v. Elkins*, 6 Dowl. 335 ; *Cumming v. Columbino*, 6 Dowl. 373 ; *Watson v. Coleman*, 7 M. & Gr. 423 ; 8 Sc. N. R. 169.

⁽²⁾ *Adams v. Staton*, 1 Bing. 769 ; 7 Moore, 365.

⁽³⁾ *Jefferies v. Shepherd*, 3 B. & Ald. 696.

⁽⁴⁾ *Rooks v. Wasp*, 5 Bing. 190 ; *Wylie v. Phillips*, 3 Bing. N. C. 776 ; *Meekin v. Whalley*, 1 Bing. N. C. 59 ; 3 Dowl. 823.

⁽⁵⁾ *Morrison v. Summers* 1 B. & Ad. 559 ; 2 Dowl. 325.

⁽⁶⁾ *Baldwin v. Richards*, 2 T. R. 511 ; *Wade v. Simeon*, 1 C. B. 610 ; *Hoars v. Dickson*, 7 C. B. 164 ; though husband and wife brought the second action, and the husband the first, *Lampley v. Sands*, 1 T. R. 584.

⁽⁷⁾ *Beavan v. Robins*, 8 D. & R. 42.

⁽⁸⁾ *Stilwell v. Clarke*, 3 Exch. 264.

⁽⁹⁾ *Doe Sutton v. Ridgway*, 5 B. & Ald. 523. See *Danvers v. Morgan*, 17 C. B. 530.

⁽¹⁰⁾ *Peacock v. Jeffrey*, 1 Taunt. 426.

went against him, brought an action for his bill of costs, the court refused to stay the latter, till the costs of the former action were paid.⁽¹⁾ And the court refused to stay an action for libel, when the plaintiff had failed in a proceeding by criminal information.⁽²⁾ So, they refused to stay an action for penalties, the defendant having been already sued by another party, and having compounded, the offence not being shown to be the same.⁽³⁾ And, generally, they refuse where the plaintiff has recovered in the former action, leaving the defendant to plead such recovery,⁽⁴⁾ though the present action is on a judgment for less than 20*l.*⁽⁵⁾ But where a defendant has committed certain specific damage, for which he may be sued by several persons, he may, in a clear case, stay any second action for the same cause.⁽⁶⁾ So, where several persons are jointly liable, and are each sued separately, and one pays the debt and costs, the court will stay the other actions.⁽⁷⁾ The application to stay a second action ought to be made promptly, though, in ejectment, it has been granted after notice of, and immediately before trial.⁽⁸⁾

5. *Staying trifling actions.*—The court will stay trifling actions for 40*s.* and under, as stated *ante*, p. 463.

6. *Staying actions brought against good faith, without authority, &c.*—If an action is brought against good faith, as pending a reference, which was agreed to be a stay of proceedings, the court or a judge may stay the action,⁽⁹⁾ or after a juror has been withdrawn on the understanding that the action was thereby to be at an end,⁽¹⁰⁾ at least

⁽¹⁾ *Smith v. Rolt*, 9 Dowl. 62.

⁽²⁾ *Wakley v. Cook*, 4 Exch. 511.

⁽³⁾ *Harrington v. Johnson*, Cowp. 744.

⁽⁴⁾ *Ross v. Jacques*, 8 M. & W. 135; *Pechell v. Layton*, 512; *id.* 712; *Liversedge v. Goode*, 2 Dowl. 141.

⁽⁵⁾ 7 & 8 Vict. c. 96, s. 57, *ante*, p. 596; *Joseph v. Buxton*, 2 D. & L. 835.

⁽⁶⁾ *Bird v. Randall*, 1 W. Bl. 389; 3 Burr. 1354.

⁽⁷⁾ *Carne v. Leigh*, 6 B. & C. 124; *Bailey v. Haines*, 15 Q. B. 533; *Newton v. Blunt*, 3 C. B. 675; 4 D. & L. 674.

⁽⁸⁾ *Doe Chadwick v. Law*, 2 W. Bl. 1158; *Doe Green v. Packer*, 2 Dowl. 373; 2 Cr. & M. 457.

⁽⁹⁾ *Moscatti v. Lawson*, 1 H. & W. 582; *Cleworth v. Pickford*, 7 M. & W. 314; *Philpot v. Thompson*, 2 D. & L. 18. See *Pennell v. Walker*, 12 June, 1856, C. P.

⁽¹⁰⁾ *Harries v. Thomas*, 2 M. & W. 32; *Moscatti v. Lawson*, 1 H. & W. 572; *Gibbs v. Ralph*, 14 M. & W. 804. See *Ponting v. Watson*, 24 Nov. 1855, B. C.

if the case is clear.⁽¹⁾ Where the action is brought *without due authority*, the court will sometimes interfere to stay proceedings, as where an attorney brings the action without the authority of the plaintiff,⁽²⁾ or where an indorser, having paid the note to the indorsee, sues the maker in the indorsee's name without the latter's authority.⁽³⁾ Where, however, a wife, living apart, brings an action in the husband's name for a trespass committed on herself, the court will not stay proceedings,⁽⁴⁾ but merely order security for costs to be given to the husband.⁽⁵⁾ It is the same as to a *cestui que trust* suing in the name of his trustee,⁽⁶⁾ or a joint contractor using the names of his co-contractors.⁽⁷⁾ A demand for indemnity against costs should always be made before the application, otherwise the costs of the application may be refused.⁽⁸⁾ An assignee of a debt can sue in the assignor's name;⁽⁹⁾ and where an assignor, who had assigned the debt as a security, sued, the proper course seemed to be to apply after judgment to stay execution.⁽¹⁰⁾ The court has refused to stay proceedings in an action by a railway company for calls, though the company had ceased to exist when the persons authorizing the action had been directors, as the circumstances had been long known to the defendant, the application being also too late and not admitting of the directors' appointment being thus questioned.⁽¹¹⁾ Where a plaintiff, recovering from lunacy, sued his bankers for a balance, the court refused to order the plaintiff to indemnify the defendants on their paying him the sum.⁽¹²⁾

7. *Actions brought contrary to rule or order of court.*—
 “In case any action, suit, or proceeding, in any court of law

(1) *Cocker v. Tempest*, 7 M. & W. 502; 9 Dowl. 306.

(2) See *post*, “Attorneys.”

(3) *Coleman v. Beadman*, 18 L. J. 263, C. P.; 7 C. B. 871.

(4) *Chambers v. Donaldson*, 9 East, 471; *Austen v. Holland*, 1 B. C. Rep. 104.

(5) *Morgan v. Thomas*, 2 Dowl. 332; *Procter v. Brotherton*, 9 Exch. 486. See *Rock v. Slade*, 7 Dowl. 22, as to a wife of a lunatic suing.

(6) *Spicer v. Todd*, 1 Dowl. 306; *Orchard v. Coulstring*, 6 Sc. N. R. 843; *Laws v. Bott*, 16 M. & W. 300.

(7) *Whitehead v. Hughes*, 2 Dowl. 258; 2 Cr. & M. 318.

(8) *Hunfley v. Bulwer*, 6 Dowl. 633. See *Morgan v. Thomas*, 2 Dowl. 332. See also *ante*, p. 866.

(9) *Pickford v. Evington*, 4 Dowl. 453; *Britton v. Perrott*, 2 Cr. & M. 597.

(10) *Sepping v. Nokes*, 2 C. B. 292.

(11) *Thames Haven Dock Company v. Hall*, 3 Rail. Cas. 441.

(12) *Hope v. Watson*, 2 Leg. Obs. 413; Tidd, N. P. 265.

or equity, shall be commenced, sued, or prosecuted in disobedience of any writ of injunction, rule, or order of either of the superior courts of law or equity at Westminster, or of any judge thereof, in any other court than that by or in which such injunction may have been issued or rule or order made, upon the production to any such other court or judge thereof of such writ of injunction, rule, or order, the said other court (in which such action, suit, or proceeding may be commenced, prosecuted, or taken), or any judge thereof, shall stay all further proceedings contrary to any such injunction, rule, or order, and thenceforth all further and subsequent proceedings shall be utterly null and void to all intents and purposes; provided always, that nothing herein contained shall be held to diminish, alter, abridge, or vary the liability of any person or persons commencing, suing, or prosecuting any such action, suit, or proceeding, contrary to any injunction, rule, or order of either of the courts aforesaid, to any attachment, punishment, or other proceeding to which any such person or persons are, may, or shall be liable in cases of contempt of either of the courts aforesaid, in regard to the commencing, suing, or prosecuting such action, suit, or proceeding."⁽¹⁾

8. *Where a criminal proceeding or error is pending.*—Where the plaintiff may bring a civil action, or proceed criminally on the same subject matter, he will not be compelled to elect between the two courses.⁽²⁾ But where the plaintiff sued a banker for money deposited, and was indicted in respect of the same money, the action was stayed till the indictment was tried;⁽³⁾ yet this was refused when the money sued for was won at play, and the plaintiff was indicted for cheating.⁽⁴⁾ So, it was refused where the plaintiff was indicted for perjury on his affidavit to hold to bail.⁽⁵⁾ So, where plaintiff's witnesses, at the trial, were indicted for perjury.⁽⁶⁾ So, though the plaintiff, who had sued for a slanderous imputation of felony, had since been convicted of the felony imputed.⁽⁷⁾

⁽¹⁾ C. L. P. Act, 1852, s. 226.

⁽²⁾ *Jones v. Clay*, 1 B. & P. 191.

⁽³⁾ *Deakin v. Praed*, 4 Taunt. 825.

⁽⁴⁾ *Anon.* 2 Salk. 649.

⁽⁵⁾ *Johnson v. Wardle*, 3 Dowl. 550.

⁽⁶⁾ *Warwick v. Bruce*, 4 M. & Sel. 140; *R. v. Tremearn*, 5 B. & C. 761; 8 D. & R. 590

⁽⁷⁾ *Symons v. Blake*, 2 Cr. M. & R. 416.

If error is pending, the court may sometimes stay proceedings in an action on the judgment.⁽¹⁾

9. *Effect of rule staying proceedings.*—The rule staying proceedings prevents the plaintiff enlarging any other rule in the cause,⁽²⁾ or obtaining an order to hold to bail,⁽³⁾ or taking out a rule to discontinue,⁽⁴⁾ but not from countermanding a notice of trial.⁽⁵⁾ The defendant does not waive a rule or order which stays all proceedings “until the further order of the court,” by giving notice of abandoning it.⁽⁶⁾

(¹) *Snook v Mallock*, 5 A. & E. 248; *Ribble v. Grantham Navigation Company*, 16 M. & W. 882. See also *ante*, p. 530. As to staying proceedings against bail, see *ante*, p. 809.

(²) *Wyatt v. Prebell*, 5 Dowl. 268.

(³) *Ball v. Stanley*, 6 M. & W. 396; 8 Dowl. 344.

(⁴) *Murray v. Silver*, 1 C. B. 638; 3 D. & L. 26.

(⁵) *Mullins v. Ford*, 2 B. C. Rep. 19; D. & L. 765.

(⁶) *Wilson v. Upfill*, 5 C. B. 245.

CHAPTER XXXVII.

SETTING ASIDE PROCEEDINGS.

- | | |
|--------------------------|----------------------------|
| 1. Generally. | 4. Admitting irregularity. |
| 2. Time for applying. | 5. Costs. |
| 3. How application made. | |

Generally.]—The grounds on which the several proceedings in an action may be set aside have already been set forth in detail under the respective titles of this work. It is only necessary to notice here the subject, so far as it is founded on general principles. When the rules of practice governing the court have been departed from by either of the parties, the fault is technically described as either a nullity or an irregularity, the latter being only a lighter degree of the same thing. The chief distinction between them is that a nullity cannot be waived by the opposite party, whatever his conduct may be, and though at a considerable distance of time the objection is sought to be made available;⁽¹⁾ while an irregularity always can be waived, but only if the application is made promptly.⁽²⁾ Though, however, a nullity may be taken advantage of at a greater distance of time than an irregularity, it does not follow that the party can set up this nullity at any period, however remote, and irrespective of his own conduct in the interval.⁽³⁾ An irregularity generally

(1) *Mortimer v. Piggott*, 2 Dowl. 615; *Cocks v. Edwards*, 2 Dowl. N. S. 55; *Graham v. Ingleby*, 5 D. & L. 737.

(2) See *Holmes v. Russell*, 9 Dowl. 487; *Roberts v. Spurr*, 3 Dowl. 551.

(3) Thus, if he expressly agreed to a writ of summons being served after the time had expired for serving it, he may be prevented from afterwards objecting to the service, *Coates v. Sandy*, 2 M. & Gr. 313. Hence it is always safer to apply as soon as possible.

consists in omitting some necessary proceeding, as a notice to plead previous to signing judgment for want of a plea, or a notice of trial previous to trying the cause, or in not taking some step within the necessary time, or in doing the thing in an informal manner. Sometimes the court will set aside a proceeding which has been taken contrary to good faith, though a step taken in such circumstances is not strictly an irregularity,⁽¹⁾ and the application must be made promptly.⁽²⁾ It is in general only the party or his representatives who can take advantage of any irregularity committed by his opponent, and not strangers to the proceedings.

2. *Time for applying to set aside.*—The general rule is, that “no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity;”⁽³⁾ and the rule must be complied with, though the party is in prison,⁽⁴⁾ or is dead and his representatives apply.⁽⁵⁾ The application must, in the long vacation, be made to a judge.⁽⁶⁾ What is a reasonable time, necessarily depends on the circumstances of each case. Taking a fresh step is not the only mode of waiving the irregularity. If there have been several irregularities, and one only is taken advantage of, the others are waived.⁽⁷⁾ An undertaking by an attorney to appear waives any irregularity in the writ or service.⁽⁸⁾ But agreeing to terms is no waiver, if caused by a mistake of the judge in point of law;⁽⁹⁾ nor is asking time to pay the debt of itself a waiver of the last proceeding.⁽¹⁰⁾ The party applying cannot waive the irregularity unless he knows it,⁽¹¹⁾ or has the means of

(1) *Smith v. Clarke*, 2 Dowl. 218.

(2) *Saunders v. Jones*, 3 D. & L. 770.

(3) Rule Pr. 135, H. T. 1853.

(4) *Primrose v. Baddeley*, 2 Dowl. 350; 2 Cr. & M. 488; *Davies v. Watkins*, 2 Dowl. N. S. 930; *Claridge v. McKenzie*, 5 M. & Gr. 251.

(5) *Weedon v. Garcia*, 2 Dowl. N. S. 64.

(6) *Woodcock v. Kilby*, 4 Dowl. 730; *Doe d. Parr v. Roe*, 1 Q. B. 700; *Quilters v. Neely*, 9 Dowl. 139.

(7) *Thorpe v. Beer*, 2 B. & Ald. 373.

(8) *Anon.* 1 Chitt. R. 129; *Homfray v. Kenning*, 2 Chitt. R. 236; *id.* 240; *Coates v. Sandy*, 9 Dowl. 381.

(9) *Whalley v. Barnett*, 1 Dowl. 607; *Woodcock v. Kilby*, 1 M. & W. 41; 4 Dowl. 730.

(10) *Anon.* 1 Dowl. 23; *Rawes v. Knight*, 1 Bing. 123.

(11) *Cox v. Tullock*, 2 Dowl. 47; *Anderdon v. Stirling*, 2 Dowl. 267; *Herbert v. Darley*, 4 Dowl. 726.

knowing it.⁽¹⁾ If the delay has been caused by any peculiarity in the circumstances, these must be set forth in the affidavit.⁽²⁾ Delay caused by changing the attorney is no excuse;⁽³⁾ nor if caused by illness of the deponent.⁽⁴⁾ If the motion is made in the court, and a previous application had been made unsuccessfully to a judge at chambers, this fact should be stated in the affidavit.⁽⁵⁾ A party is not prevented from applying, though the costs have been taxed and paid; thus, where a mistake had been made in the declaration and particulars, these were allowed to be set aside after the costs had been taxed and paid.⁽⁶⁾

3. *How application made.*—In ordinary and clear cases, the application should be made to a judge instead of to the court; and even in more doubtful cases, especially if the 'reasonable' time must elapse, before the application can be made to the court.⁽⁷⁾ If the judge refuse the application, the party may then appeal to the court; and this should be done within the first four days of the ensuing term. The court will take for granted in such cases that the application was made to the judge in proper time,⁽⁸⁾ and where otherwise the application to the court would be too late, the rule should be drawn up upon reading an affidavit of that fact,⁽⁹⁾ it being insufficient for the judge to certify the same in court.⁽¹⁰⁾ Though the judge refuses to give time to apply to the court, the party will not be held to waive any necessary steps that may be taken in the meantime.⁽¹¹⁾ The application must be directed at the first irregularity committed; thus, if a writ is irregular, but the service regular, the application should be to set aside the

(1) *Esdaile v. Davis*, 6 Dowl. 465; *Farber v. French*, 5 N. & M. 658.

(2) *Ibid.*; *Orton v. France*, 4 Dowl. 598.

(3) *Golding v. Scarborough*, 2 H. & W. 94.

(4) *Orton v. France*, 4 Dowl. 598.

(5) *Sugars v. Concanen*, 5 M. & W. 30; 7 Dowl. 391; *Goren v. Tute*, 7 M. & W. 142.

(6) *Emery v. Webster*, 9 Exch. 242; *Cannan v. Reynolds*, 5 E. & B. 301.

(7) *Woodcock v. Kilby*, 4 Dowl. 739; *Doe d. Parr v. Roe*, 1 Q. B. 700.

(8) *Lane v. Newman*, 1 B. C. Rep. 93.

(9) *Sugars v. Concanen*, 3 M. & W. 30; 7 Dowl. 391.

(10) *Goren v. Tute*, 7 M. & W. 142.

(11) *Woodcock v. Kilby*, 1 M. & W. 41; *Bellotti v. Barella*, 4 Dowl. 719; *Tory v. Stevens*, 6 Dowl. 275.

writ.⁽¹⁾ Hence the rule should correctly state the proceeding to be set aside, and it will be discharged, if it seek, for instance, to set aside the writ instead of the service,⁽²⁾ or to set aside the copy instead of the copy and service.⁽³⁾ "Where a summons is obtained to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated therein."⁽⁴⁾ Also "where a rule to show cause is obtained to set aside an award or annuity, the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute shall be stated in the rule to show cause."⁽⁵⁾ The rule will not be a stay of proceedings, unless it so order, until it is made absolute; and if it so order, there must have been a two-days' notice previous to the application.⁽⁶⁾ The rule should also ask for the costs. There should be an affidavit on making the application, annexing, if necessary, a copy of the process or document stated to be irregular, in order to make the objection more distinct. Thus, an affidavit to set aside a judgment on a cognovit should state the error in the accounts;⁽⁷⁾ to set aside an interlocutory judgment, it must state judgment has been signed;⁽⁸⁾ to set aside proceedings for want of being served with process, it should show he is defendant, and that the process never came to his knowledge.⁽⁹⁾ It seems the defendant in his affidavit need not swear to merits.⁽¹⁰⁾ If the case is doubtful, the court may refuse the application and leave the party to bring error, if the irregularity form an error on the record;⁽¹¹⁾ and in some cases, as on setting aside a judgment, the court impose terms, so as to prevent the defendant bringing an action.⁽¹²⁾

4. *Admitting the irregularity.*—Where the party committing the irregularity discovers it, and wishes to avoid the

(1) *Edwards v. Danks*, 4 Dowl 357; *Hardwicke v. Wardle*, 4 D. & L. 739; *Chapman v. Becks* 3 D. & L. 350.

(2) *Huggitt v. Parkin*, 1 Bing. 65.

(3) *Hall v. Reddington*, 5 M. & W. 605; *Crow v. Field*, 8 Dowl. 231; *Kenny v. Bishop*, 9 Dowl. 57.

(4) Rule Pr. 136, H. T. 1853.

(5) Rule Pr. 169, H. T. 1853.

(6) Rule Pr. 160, H. T. 1853.

(7) *Pready v. Lovell*, 4 Dowl. 671.

(8) *Classey v. Drayton*, 8 Dowl. 184.

(9) *Emerson v. Brown*, 8 Sc. N. R. 219; *Stevenson v. Thorn*, 13 M. & W. 149.

(10) *Williams v. Williams*, 2 C. M. R. 473; *Claridge v. McKenzie*, 5 M. & Gr. 251; 2 Dowl. N. S. 898.

(11) *Walker v. Needham*, 1 Dowl. N. S. 220.

(12) *Pearce v. Chaplin*, 10 Jur. 966.

expense of the other party applying to set aside, he may serve a notice on such opponent to this effect, and offering to pay all expenses caused by the irregularity. If this offer is refused, the opponent will be made to pay all costs of making the rule absolute subsequent to the offer.⁽¹⁾

5. *Costs.*—If the rule is made absolute and costs are asked by the rule, it is generally made absolute with costs ;⁽²⁾ if the rule is moved without costs, it is made absolute with or without costs according to circumstances.⁽³⁾ Thus, if the application should have been made at chambers, the rule will generally be made absolute without costs.⁽⁴⁾ “In all cases where a rule is obtained to show cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally, without any special direction upon the matter of costs, it is to be understood as discharged with costs.”⁽⁵⁾ A judge at chambers gives costs in the same way as the court, and if he refuse costs, the party cannot thereafter apply to the court for those costs.⁽⁶⁾ If the party on obtaining a rule absolute refuse to consent to bring no action, he will seldom be allowed costs. If the costs are not allowed on making the rule absolute, they cannot be recovered as damages in an action brought in respect of the irregularity.⁽⁷⁾ The costs must be paid to the party alone who obtains the rule, if he is one of several defendants.⁽⁸⁾ If a judge set aside an irregular judgment, signed by the plaintiff, with costs, he has power to stay proceedings till such costs are paid,⁽⁹⁾ and will do so, unless the defendant issue an attachment for the costs and take the plaintiff thereupon.

⁽¹⁾ *Briscoe v. Beckett*, 4 M. & R. 100; *Halton v. Stocking*, 2 Cr. & J. 60.

⁽²⁾ *Tilley v. Henley*, 1 Chitt. R. 136; *Edwards v. Danks*, 4 Dowl. 357.

⁽³⁾ *Ibid.*; *Anon.* 1 Chitt. R. 390; *Duncombe v. Crisp*, 2 Dowl. 5; *Re Morrison*, 8 Dowl. 94.

⁽⁴⁾ *White v. Feltham*, 16 L. J. 14, C. P.; 3 C. B. 658.

⁽⁵⁾ Rule Pr. 137, H. T. 1853.

⁽⁶⁾ *Davy v. Brown*, 1 Sc. 384; *Doe Prescott v. Roe*, 1 Dowl. 274; 2 M. & Sc. 119.

⁽⁷⁾ *Loton v. Devereux*, 3 B. & Ad. 343.

⁽⁸⁾ *Showler v. Stokes*, 2 D. & L. 2.

⁽⁹⁾ *Wenham v. Downes*, 5 N. & M. 244.

CHAPTER XXXVIII.

DEATH OF A PARTY DURING ACTION.

“THE death of a plaintiff or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned.”⁽¹⁾

Death of one or more plaintiffs or defendants.]—“If there be two or more plaintiffs or defendants, and one or more of them should die, if the cause of such action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.”⁽²⁾
The death of the wife abates an action brought by her and her husband for a debt due to her *dum sola*.⁽³⁾

Death of sole plaintiff.]—“In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed, and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of deceased plaintiff, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion.”⁽⁴⁾

⁽¹⁾ C. L. P. Act, 1852, s. 135.

⁽²⁾ *Ibid.* s. 136.

⁽³⁾ *Checchi v. Powell*, 6 B. & C. 253; 9 D. & R. 243.

⁽⁴⁾ C. L. P. Act, 1852, s. 137.

Form of Affidavit to obtain Leave.[*Title of court and cause.*]

I, E. F., of _____, make oath and say—

1, 2, 3. [*State the stage of the cause shortly, and death of plaintiff.*]

4. That the said A. B., by his last will and testament, appointed me the executor thereof, and that I duly proved the same on the _____, and thereby became his legal representative [*or, that the said A. B. died intestate, and that on _____ letters of administration of his goods and chattels were duly granted to me by _____, and I thereby became the said A. B.'s legal representative.*]

Death of sole defendant.]—“In case of the death of a sole defendant, or sole surviving defendant, where the action survives,⁽¹⁾ the plaintiff may make a suggestion, either in any of the pleadings, if the cause has not arrived at issue, or in a copy of the issue, if it has so arrived, of the death, and that a person named therein is the executor or administrator of the deceased, and may thereupon serve such executor or administrator with a copy of the writ and suggestion, and with a notice, signed by the plaintiff or his attorney, requiring such executor or administrator to appear within eight days after service of the notice, inclusive of the day of such service, and that in default of his so doing the plaintiff may sign judgment against him as such executor or administrator, and the same proceedings may be had and taken in case of non-appearance, after such notice, as upon a writ against such executor or administrator in respect of the cause for which the action was brought; and in case no pleadings have taken place before the death, the suggestion shall form part of the declaration, and the declaration and suggestion may be served together, and the new defendant shall plead thereto at the same time; and in case the plaintiff shall have declared, but the defendant shall not have pleaded before the death, the new defendant shall plead at the same time to the declaration and suggestion, and in case the defendant shall have pleaded before the death, the new defendant shall be at liberty to plead to the suggestion only by way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor or administrator, unless by leave of the court or a judge, he should be permitted to plead fresh matter in answer to the declaration; and in case the defendant shall have pleaded before the death, but the pleadings shall not

(¹) See as to right of action surviving, *ante*, p. 651.

have arrived at issue, the new defendant, besides pleading to the suggestion, shall continue the pleading to issue in the same manner as the deceased might have done, and the pleadings upon the declaration and the pleadings upon the suggestion shall be tried together; and in case the plaintiff shall recover, he shall be entitled to the like judgment in respect of the debt or sum sought to be recovered; and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion, and subsequent thereto, he shall be entitled to the like judgment as in an action originally commenced against the executor or administrator."⁽¹⁾ This section puts the executor or administrator in the same position as if he had been the original defendant; and, therefore, if the plaintiff discontinue after the suggestion, he will be allowed to do so only on payment of all the costs of the cause.⁽²⁾

Form of Suggestion of Death of one of several Plaintiffs.

— And hereupon, that is to say, on the _____, the said A. B. suggests and gives the court here to understand and be informed, that [after the issuing of the said writ, or, after the plaintiffs declared as aforesaid, or, as the case may be], the said E. F. died. Therefore, let no further proceedings be had in this cause at the suit of the said E. F.

Form of Suggestion of Death of one of several Defendants.

— And the said A. B. suggests and gives the court here to understand and be informed, that after, &c., the said G. H. died. Therefore, let all further proceedings in this cause against the said G. H. be stayed.

Form of Suggestion of Death of sole Plaintiff.

— And hereupon, on _____, comes E. F., by the said P. A., his attorney, and by leave of the Honourable Mr. Justice _____, suggests and gives the court here to understand and be informed that after, &c., the said A. B. died, and that he, the said E. F., is the executor of his last will and testament, [or is administrator of all and singular the goods and chattels which were of the said A. B. at the time of his death, who died intestate.]

Form of Suggestion of Death of sole Defendant.

[The form is similar, and add, that the cause of action survives against his personal representatives.]

⁽¹⁾ C. L. P. Act, 1852, s. 138.

⁽²⁾ *Benge v. Swaine*, 15 C. B. 784.

Form of Notice requiring Representative of Defendant to appear.

Take notice that I, [or A. B.] commenced an action against C. D., since deceased, by a writ of summons issued out of _____, tested on _____, and that the document hereto annexed, marked A, is a true copy of that writ, and that proceedings in that action were duly taken against the said C. D., and that I have entered a suggestion on the said proceedings of the death of the said C. D., and that you are executor, &c. [or administrator, &c.], and a copy of the suggestion made therein is hereunto annexed, marked B. And further take notice, that you are required, within eight days after service of this notice, inclusive of the day of such service, to appear or cause an appearance to be entered for you in the said court to the said action. And that in default of your so doing, the said C. D. may sign judgment against you as such [executor] as aforesaid Dated. &c.

To G. H.

A. B. of _____.

Death between verdict and judgment.]—"The death of either party, between the verdict and the judgment, shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict."⁽¹⁾ A judgment so entered up binds the lands in the hands of the heir.⁽²⁾ The statute does not apply to a nonsuit;⁽³⁾ and if the defendant is delayed by the plaintiff seeking to set aside the nonsuit, the action does not abate.⁽⁴⁾ An information at the suit of the Crown does not so abate.⁽⁵⁾ The statute applies to all personal actions for costs as well as for contracts,⁽⁶⁾ but not to the death of a party before the sittings or assizes,⁽⁷⁾ though it does, if the death is after the first day of the assizes or sittings.⁽⁸⁾ If the judgment be entered up within the two terms, it has the same effect as if entered up during the life of the deceased party.⁽⁹⁾ Where, at the trial, a verdict was taken subject to a reference, the two terms counted from the complete verdict, viz., the date of the award.⁽¹⁰⁾ Though the statute requires the judgment to be

(1) C. L. P. Act, 1852, s. 139; 17 Car. 2, c. 8, s. 1.

(2) *Saunders v. McGowan*, 12 M. & W. 221; 3 D. & L. 405.

(3) *Dowbiggin v. Harrison*, 10 B. & C. 480.

(4) *Bull v. Price*, 5 M. & P. 413; 7 Bing. 237.

(5) *Attorney-General v. Buckley*, Park, 264.

(6) *Palmer v. Cohen*, 2 B. & Ald. 966.

(7) *Taylor v. Harris*, 3 B. & P. 549.

(8) *Anon.* 1 Salk. 8; 7 T. R. 32; *Jacobs v. Miniconi*, 7 T. R. 31; *Johnson v. Bridge*, 3 Dowl. 207.

(9) *Freeman v. Rosher*, 13 Q. B. 780.

(10) *Heathcote v. Wing*, 11 Exch. 355.

entered up within two terms, the court is not fettered by that statute in its jurisdiction to enter judgment *nunc pro tunc* in a fit case.⁽¹⁾ But it is quite settled that the court will not allow judgment to be entered up *nunc pro tunc*, except the delay is occasioned by the act of the court.⁽²⁾ The judgment need not be actually entered on the roll, but need only be signed within the two terms.⁽³⁾

Death after interlocutory and before final judgment.]—“If the plaintiff in any action happen to die after an interlocutory judgment and before a final judgment obtained therein, the said action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executor or administrator of such plaintiff; and if the defendant die after such interlocutory judgment and before final judgment therein obtained, the said action shall not abate if such action might be originally prosecuted or maintained against the executor or administrator of such defendant; and the plaintiff, or if he be dead after such interlocutory judgment, his executors or administrators, shall and may have a writ of revivor, in the form contained in the schedule (A.) to this act annexed, marked No. 9, or to the like effect, against the defendant, if living after such interlocutory judgment, or if he be dead, then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by him or them; and if such defendant, his executors or administrators, shall appear at the return of such writ, and not show or allege any matter sufficient to arrest the final judgment, or shall make default, a writ of inquiry of damages shall be thereupon awarded, or the amount, for which final judgment is to be signed, shall be referred to one of the Masters, as hereinbefore provided; and upon the return of the writ, or delivery of the order with the amount indorsed thereon to the plaintiff, his executors or administrators, judgment final shall be given for the said plaintiff, his executors or administrators prosecuting such writ of revivor against such defendant, his executors or administrators respectively.”⁽⁴⁾

Form of Writ of Revivor. (Schedule A. No. 9.)

VICTORIA, by the grace of God, &c., to E. F. of _____, greeting:

⁽¹⁾ *Evans v. Rees*, 12 A. & E. 167.

⁽²⁾ *Freman v. Tranah*, 12 C. B. 406.

⁽³⁾ *Helie v. Baker*, 1 Sid. 385; *Webb v. Spurrell*, Barnes, 261.

⁽⁴⁾ C. L. P. Act, 1852, s. 140.

[C. L.—vol. ii.]

We command you that, within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our court of _____, to show cause why A. B. [or C. D., as executor of the last will and testament of the said A. B. deceased, or as the case may be] should not have execution against you [if against a representative, here insert, as executor of the last will and testament of _____ deceased, or as the case may be], of a judgment whereby the said A. B. [or as the case may be], on the _____ day of _____, in the said court recovered against you [or as the case may be], £ _____; and take notice, that in default of your so doing the said A. B. [or as the case may be] may proceed to execution.

Witness, &c.

Compelling continuance or abandonment of action in case of death.—“Where an action would, but for the provisions of the Common Law Procedure Act, 1852, have abated by reason of the death of either party, and in which the proceedings may be revived and continued under that act, the defendant or person against whom the action may be so continued may apply by summons to compel the plaintiff, or person entitled to proceed with the action in the room of the plaintiff, to proceed according to the provisions of the said act, within such time as the judge shall order; and in default of such proceeding, the defendant, or other person against whom the action may be so continued as aforesaid, shall be entitled to enter a suggestion of such default, and of the representative character of the person by or against whom the action may be proceeded with, as the case may be, and to have judgment for the costs of the action and suggestion against the plaintiff, or against the person entitled to proceed in his room, as the case may be, and, in the latter case, to be levied of the goods of the testator or intestate.”⁽¹⁾

Form of Suggestion of Plaintiff's Default to Proceed.

And now, on _____, E. F. suggests and gives the court here to understand and be informed, that the defendant died after, &c., and that (*recite judge's order*), and the said E. F. further suggests and gives the court here to understand and be informed that the plaintiff did not, pursuant to the said order, within _____, or at any other time after the making of the said order, proceed with the action pursuant to the provisions of the Common Law Procedure Act, 1852, and therein made default, and that the said E. F. is executor of the last will and testament of the defendant. And the said E. F. prays judgment for the

⁽¹⁾ C. L. P. Act, 1854, s. 92.

costs of this action and of the said suggestion. Therefore it is considered that the said E. F. do recover against the plaintiff £ , for the costs of the defence to this action and of the said suggestion.

Death after final judgment.—The party must revive the judgment, see *post*, “Revivor.”

Death pending error.—See *ante*, p. 550.

Death during execution.—See *ante*, pp. 570 and 730.

CHAPTER XXXIX.

REVIVOR AND SCIRE FACIAS.

1. REVIVOR.

When necessary by lapse of time.]—"During the lives of the parties to a judgment, or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a revival of the judgment."⁽¹⁾ This act applies to all judgments less than six years old at the time the act came into operation.⁽²⁾ Though, however, the judgment is more than six years old, it is not necessary to revive it, if it was a judgment for the Queen;⁽³⁾ nor if the defendant has agreed to dispense with revivor,⁽⁴⁾ even by parol;⁽⁵⁾ nor if the plaintiff has been prevented by proceedings in error,⁽⁶⁾ or by injunction,⁽⁷⁾ or by an agreement to that effect,⁽⁸⁾ nor if the judgment was signed on a warrant of attorney given by an insolvent pursuant to 1 & 2 Vict. c. 110, s. 17; nor, it seems, if the execution is on a rule of court under 1 & 2 Vict. c. 110, s. 18.⁽⁹⁾

(1) C. L. P. Act, 1852, s. 128.

(2) *Boodle v. Davis*, 8 Exch. 351.

(3) *Anon.* 2 Salk. 603; *Burr v. Attwood*, 1 Lord Raym. 328.

(4) *Tripp v. Stanley*, 5 D. & L. 262; *Harmer v. Johnson*, 14 M. & W. 336; 3 D. & L. 38; *Cooper v. Norton*, 16 L. J. 364. Q. B.

(5) *Morgan v. Burgess*, 1 Dowl. N. S. 850.

(6) *Winter v. Lightbound*, 1 Str. 301; *Booth v. Booth*, 6 Mod. 288; *Adams v. Savage*, 3 Salk. 321.

(7) *Ib.*; *Michel v. Cue*, 2 Burr. 660.

(8) *Ibid.*; *Hiscock v. Kemp*, 5 N. & M. 113; 3 A. & E. 676; *Morris v. Jones*, 2. B. & C. 242; *Dillon v. Brown*, 6 Mod. 14.

(9) *Spooner v. Payne*, 17 L. J. 68, Q. B.

If the writ of execution is sued out during the six years, revivor is not necessary, though it be executed after the six years,⁽¹⁾ and it is no objection to reviving the judgment, that a writ of *fi. fa.* already issued might have been renewed.⁽²⁾ If the execution is sued out after the six years without reviving the judgment, an application must be made to the court or a judge to set it aside,⁽³⁾ which has been allowed five months afterwards; ⁽⁴⁾ or the omission to revive may be alleged for error.⁽⁵⁾

The judgment cannot be revived after twenty years from the time when there was some person capable of giving a discharge,⁽⁶⁾ unless part of the principal or interest has in the mean time been paid or acknowledged.⁽⁷⁾

When necessary by death of parties.]—Where the plaintiff or defendant dies after final judgment, it must be revived by or against their personal representatives before execution can issue.⁽⁸⁾ Yet the writ of execution, if sued out during life, may be executed by the sheriff after the death of either party,⁽⁹⁾ and the proceeds paid either to the executor or administrator, or into court.⁽¹⁰⁾ Where, after the judgment is revived, the defendant dies before execution, the judgment must be revived against his executors before the plaintiff can have execution.⁽¹¹⁾ The writ of revivor must be in the names of all the executors of the plaintiff.⁽¹²⁾ If the representative is a *feme covert*, the writ of revivor must

(1) *Franklin v. Hodgkinson*, 3 D. & L. 554.

(2) *Holmes v. Newlands*, 5 Q. B. 634.

(3) *Poland v. Newman*, 6 M. & Sel. 179. Such execution is not void but voidable only, *Blanchenay v. Burt*, 4 Q. B. 707; *Shirley v. Wright*, 1 Salk. 273; *Reynolds v. Martin*, 1 G. & D. 157.

(4) *Goodtitle Murrell v. Badtitle*, 9 Dowl. 1009.

(5) *Ibid.*; *Mortimer v. Piggott*, 4 A. & E. 363, n.; 2 Dowl. 615.

(6) 3 & 4 Will. 4, c. 27, s. 40.

(7) *Thomas v. Williams*, 3 Dowl. 655.

(8) 1 Saund. 219 e, f; 2 Saund. 6, 72 o; Bac. Abr. "*sci. fa.*" c. 5; 2 Saund. 9 a, n 9. An administrator *de bonis non* must revive the original judgment, *Treanion v. Laurence*, 2 Lord Raym. 1049; *Clerk v. Withers*, *ibid.* 1072; 1 Salk. 323. An executor on coming of age must revive the judgment obtained by the administrator *durante minori etate*, *Beamond v. Long*, Cro. Car. 227; *Hatton v. Mascall*, 1 Lev. 181; Rol. Abr.

(9) *Cleeve v. Beer*, Cro. Car. 459; *Harrison v. Bowden*, 1 Sid. 29; *Clerk v. Withers*, 1 Salk. 322.

(10) *Clerk v. Withers*, 2 Lord Raym. 1073.

(11) *Hardisty v. Barry*, 2 Salk. 598.

(12) *Scott v. Briant*, 6 N. & M. 381; 2 H. & W. 54.

be in the joint names of the wife and husband ; and if the personal representative is a bankrupt, he proceeds or is proceeded against as other persons. If the deceased has left lands, then the judgment may be recovered against the heir or terre-tenants in the event of the execution against the personal representatives proving fruitless.⁽¹⁾

Where the plaintiff or defendant dies between verdict and judgment, or between interlocutory and final judgment, or where one of several plaintiffs or defendants dies after judgment, see *ante*, p. 1058, 1059.

When necessary by marriage of female plaintiff or defendant.]—See *ante*, p. 649.

Bankruptcy or insolvency of party.]—If a party obtaining interlocutory judgment become bankrupt before final judgment, the assignees may revive the judgment.⁽²⁾ The title of the assignees need only be stated generally in the writ of revivor.

How judgment revived.]—"In cases where it shall become necessary to revive a judgment by reason either of lapse of time, or of a change, by death or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may either sue out a writ of revivor in the form hereinafter mentioned, or apply to the court or a judge for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the court that such party is entitled to have execution of the judgment and to issue execution thereupon ; such leave to be granted by the court or a judge upon a rule to show cause or a summons, to be served according to the present practice, or in such other manner as such court or judge may direct, and which rule or summons may be in the form contained in the schedule (A.) to this act annexed, marked No. 7, or to the like effect."⁽³⁾

(1) See 2 Saund. 9 a, n. 9 ; *Braithwaite v. Skinner*, 5 M. & W. 313 ; *Eyres v. Taunton*, 2 Salk. 598.

(2) *Bibbins v. Mantell*, 2 Wils. 358, 372 ; *Winter v. Kretchman*, 2 T. R. 45 ; *Ouchterlony v. Gibson*, 6 Sc. N. R. 577.

(3) C. L. P. Act, 1852, s. 129.

Form of Rule or Summons where a Judgment Creditor applies for Execution against a Judgment Debtor. (Schedule A. No. 7.)

[*Formal parts as at present.*] — C. D. show cause why A. B. [*or as the case may be*] should not be at liberty to enter a suggestion upon the roll in an action wherein the said A. B. was plaintiff and the said C. D. was defendant, and wherein the said A. B. obtained judgment for £ against the said C. D. on the day of , that it manifestly appears to the court that the said A. B. is entitled to have execution of the said judgment, and to issue execution thereupon, and why the said C. D. should not pay to the said A. B. the costs of this application to be taxed.

[NOTE.—*The above form may be modified so as to meet the case of an application by or against the representative of a party to the judgment.*]

“ Upon such application, in case it manifestly appears that the party making the same is entitled to execution, the court or a judge shall allow such *suggestion* as aforesaid to be entered in the form contained in the schedule (A.) to this act annexed, marked No. 8, or to the like effect, and execution to issue thereupon, and shall order whether or not the costs of such application shall be paid to the party making the same; and in case it does not manifestly so appear, the court or judge shall discharge the rule or dismiss the summons, with or without costs: provided nevertheless, that in such last-mentioned case the party making such application shall be at liberty to proceed by writ of revivor or action upon the judgment.”⁽¹⁾

Form of Suggestion that the Judgment Creditor is entitled to Execution against the Judgment Debtor. (Schedule A. No. 8.)

And now, on the day of , it is suggested and manifestly appears to the court, that the said A. B. [*or C. D., as executor of the last will and testament of the said A. B. deceased, or as the case may be*] is entitled to have execution of the judgment aforesaid against the said E. F. [*or against G. H., as executor of the last will and testament of the said E. F., or as the case may be.*] Therefore it is considered by the court that the said A. B. [*or, C. D., as such executor as aforesaid, or as the case may be*] ought to have execution of the said judgment against the said E. F. [*or against G. H., as such executor as aforesaid, or as the case may be.*]

⁽¹⁾ C. L. P. Act, 1852, s. 130.

"The writ of revivor shall be directed to the party called upon to show cause why execution should not be awarded, and shall bear teste on the day of its issuing; and, after reciting the reason why such writ has become necessary, it shall call upon the party to whom it is directed to appear, within eight days after service thereof, in the court out of which it issues, to show cause why the party at whose instance such writ has been issued should not have execution against the party to whom such writ is directed; and it shall give notice that, in default of appearance, the party issuing such writ may proceed to execution; and such writ may be in the form contained in the schedule (A.) to this act annexed, marked No. 9, or to the like effect, and may be served in any county, and otherwise proceeded upon, whether in term or vacation, in the same manner as a writ of summons; and the venue in a declaration upon such writ may be laid in any county, and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action."⁽¹⁾

Form of Writ of Revivor. (Schedule A. No. 9.)

VICTORIA, by the grace of God, &c. to E. F. of _____, greeting: We command you that, within eight days after the service of this writ upon you, inclusive of the day of such service, you appear in our court of _____, to show cause why A. B. [or C. D., as executor of the last will and testament of the said A. B. deceased, or as the case may be] should not have execution against you [if against a representative, here insert, as executor of the last will and testament of _____, deceased, or as the case may be], of a judgment whereby the said A. B. [or as the case may be], on the _____ day of _____, in the said court recovered against you [or as the case may be], £ _____, and take notice, that in default of your so doing the said A. B. [or as the case may be] may proceed to execution.

Witness, &c.

"A writ of revivor to revive a judgment less than ten years old shall be allowed without any rule or order; if more than ten years old, not without a rule of court or a judge's order; nor, if more than fifteen, without a rule to show cause."⁽²⁾

The affidavit in support of the application ought to state that the judgment is unsatisfied, and that the defendant is

⁽¹⁾ C. L. P. Act, 1852, s. 131.

⁽²⁾ *Ibid.* s. 134.

living, or as the case may be.⁽¹⁾ The attorney who obtained the judgment may be a proper person to make an affidavit;⁽²⁾ though such affidavit may be dispensed with.⁽³⁾ Where the rule is directed to executors, it should be served on all.⁽⁴⁾ Where the defendant was abroad, the rule was allowed to be stuck up in the office and served on his tenants in this country.⁽⁵⁾ The judgment cannot be impeached on showing cause, but a distinct motion must be made to set it aside.⁽⁶⁾

The writ of revivor issues out of the court in which the judgment stands,⁽⁷⁾ and is sued out like a writ of summons by taking a *præcipe* to the office. It may issue before the return of a *fi. fa.* issued on the judgment.⁽⁸⁾ "Notice in writing to the plaintiff, his attorney or agent, shall be sufficient appearance to a writ of revivor."⁽⁹⁾ "A plaintiff shall not be allowed to quash his own writ of *scire facias* or revivor after a defendant has appeared, except on payment of costs."⁽¹⁰⁾ The defendant cannot plead to a writ of revivor matter which ought to have been pleaded to the original action.⁽¹¹⁾ Where judgment had been revived for lapse of time, the defendant was held entitled to plead a seizure under a *fi. fa.* issued on the judgment, though the *fi. fa.* had not been returned nor the judgment satisfied.⁽¹²⁾ The plaintiff may be nonsuit at the trial as in other cases.⁽¹³⁾ The jury cannot give damages for any delay in execution.⁽¹⁴⁾ Before the plaintiffs sign judgment, they should, if executors, obtain probate.⁽¹⁵⁾ The execution must pursue the judgment of revivor.⁽¹⁶⁾

(1) See *Hardisty v. Barny*, 2 Salk. 598; *Lowe v. Robins*, 1 B. & B. 381; 3 Moore, 757.

(2) *Duke of Norfolk v. Leicester*, 1 M. & W. 204; 4 Dowl. 746.

(3) *Smith v. Mee*, 1 D. & L. 907; 7 Sc. N. R. 799.

(4) *Thomas v. Williams*, 3 Dowl. 654.

(5) *Macdonald v. Maclaren*, 11 M. & W. 485.

(6) *Thomas v. Williams*, 3 Dowl. 654.

(7) 2 Saund. 72 n.

(8) *Holmes v. Newlands*, 5 Q. B. 367.

(9) C. L. P. Act, 1852, s. 133.

(10) Rule Pr. 78, H. T. 1853.

(11) *Bradley v. Eyre*, 11 M. & W. 432; *Bradley v. Urquhart*, *ib.* 456; 2 Dowl. N. S. 1042; *Philipson v. Earl Egremont*, 6 Q. B. 587.

(12) *Holmes v. Newlands*, 5 Q. B. 371, 634.

(13) *O'Mealy v. Wilson*, 1 Camp. 484.

(14) *Henriques v. Dutch East India Company*, 2 Lord Raym. 1532; 2 Str. 807; *Knox v. Costello*, 3 Burr. 1791.

(15) *Vogel v. Thompson*, 1 Exch. 60.

(16) *Davis v. Norton*, 1 Bing. 133.

Where a second revivor becomes necessary, the writ should recite the previous writ and the judgment obtained thereon.⁽¹⁾

II. SCIRE FACIAS.

A *scire facias* is a secondary writ founded on some record, and the object of it is to devolve the benefit or obligations of such record on some person not originally a party thereto, as where one of the parties marries or dies. It is more than a mere continuation of the action, and confers new rights.⁽²⁾ In some cases it may be considered an original proceeding, as where it is brought against bail on their recognizance, to repeal letters patent,⁽³⁾ or against pledges in replevin. "All writs of *scire facias* issued out of any of the superior courts of law at Westminster against bail on a recognizance; *ad audiendum errores*; against members of a joint stock company, or other body, upon a judgment recorded against a public officer or other person sued as representing such company or body, or against such company or body itself;⁽⁴⁾ by or against a husband to have execution of a judgment for or against a wife; for restitution after a reversal in error; upon a suggestion of further breaches after judgment for any penal sum, pursuant to the statute 8 & 9 Will. 3, c. 11; or for the recovery of land taken under an *elegit*, shall be tested, directed, and proceeded upon, in like manner as writs of revivor."⁽⁵⁾ "Proceedings against executors upon a judgment of assets *in futuro* may be had and taken in the manner provided by the Common Law Procedure Act, 1852, s. 131, as to writs of revivor."⁽⁶⁾

(1) *Walker v. Thelluson*, 1 Dowl. N. S. 578.

(2) *Farrell v. Gleeson*, 11 Cl. & F. 702; *Agassis v. Palmer*, 1 D. & L. 18; 6 Sc. N. R. 603; *Executors of Wright v. Nutt*, 1 T. R. 388.

(3) See Tidd's Forms; 2 Saund. 72 p, q; *R. v. Eastern Archipelago Company*, 1 E. & B. 310; 2 E. & B. 511.

(4) See *ante*, pp. 739, 747, 748.

(5) C. L. P. Act, 1852, s. 132.

(6) C. L. P. Act, 1854, s. 91.

CHAPTER XL.

OUTLAWRY.

- | | |
|----------------------------|------------------------|
| 1. In what cases. | 3. Capias utlagatum. |
| 2. How to obtain outlawry. | 4. Reversing outlawry. |
-

1. *In what cases.*]—Where a party wilfully avoids the execution of the process of the court, he may be outlawed, i. e. put beyond the protection of the law.⁽¹⁾ He thereby forfeits to the Crown all his personal estate and real chattels on office found.⁽²⁾ He cannot sue in his own right or otherwise appear in, or make any application to the court, except to reverse his outlawry.⁽³⁾ But he may protect himself from being wrongfully charged in execution;⁽⁴⁾ or he may protect himself as a witness;⁽⁵⁾ or he may sue or be sued *en autre droit*;⁽⁶⁾ or he may apply for his discharge in the Insolvent Debtors Court.⁽⁷⁾ And generally he may protect himself against any wrongful proceeding,⁽⁸⁾ as to set aside a judgment on a void warrant of attorney.⁽⁹⁾

(1) Com. Dig. Ulagary B. 2 Will. 4, c. 39, ss. 5, 6.

(2) *R. v. Cooke*, 1 M. & Cl. & Y. 196; 2 Roll. Abr. 806 l., 40; Com. Dig. Utlag. D.; *Macrae v. Hyndman*, 1 Rob. 571; *Doe Griffith v. Prichard*, 5 B. & Ad. 765.

(3) *Aldridge v. Buller*, 2 M. & W. 412; 5 Dowl. 733; *R. v. Lowe*, 8 Exch. 697; *Re Ford*, 1 B. C. Rep. 88; *Re Mander*, 6. Q. B. 867.

(4) *Adcock v. Fiske*, 8 Sc. 138; 8 Dowl. 66.

(5) Co. Litt. 6 b.

(6) *Walfred v. Eversham*, 8 Moore, 431; *Brook v Phillips*, Cro. Elis. 684.

(7) *R. v. Insolvent Court*, 3 N. & P. 543.

(8) *Aldridge v. Buller*, 2 M. & W. 412; *Walker v. Thelluson*, 1 Dowl. N. S. 578; *Re Pyne*, 5 C. B. 407.

(9) *Davis v. Trevannion*, 2 D. & L. 743.

A defendant who wilfully avoided service of a writ of summons might formerly be proceeded against by writ of *distringas* and thereafter to outlawry, but that writ is now abolished,⁽¹⁾ and outlawry can only proceed on final process. It is competent only where a *capias* would lie before 2 Will. 4, c. 39; and cannot proceed against a peer or member of Parliament.⁽²⁾ In general, any male above twelve may be outlawed,⁽³⁾ and a female of any age may be outlawed or waived.⁽⁴⁾ If, however, the party went abroad before the *exigi facias* was awarded, though he may have gone abroad to avoid his creditors,⁽⁵⁾ the outlawry, though not liable to be set aside on motion for irregularity, may be reversed on error brought.⁽⁶⁾ So, a defendant cannot be outlawed, unless he wilfully avoid process, and it cannot be executed upon him.⁽⁷⁾ Yet he cannot set aside the outlawry, on an affidavit that he might easily have been found.⁽⁸⁾ Proceedings in error, being a *supersedeas* of execution, prevent the defendant being outlawed, unless the grounds of error are frivolous.⁽⁹⁾

2. *How to obtain outlawry.*—The first step is to sue out a *ca. sa.* directed to the sheriff of the county of the venue. The writ is tested during term,⁽¹⁰⁾ and “must be made returnable on a day certain in term, and may be so returnable on any day in term; and it shall be sufficient that there be eight days between the teste and return.”⁽¹¹⁾ The writ being returned, a writ of *exigi facias* is then sued out, which must be tested on the fourth day after the return of the *ca. sa.*, and in term time.⁽¹²⁾ There

(1) C. L. P. Act, 1852, s. 24.

(2) *Cassidy v. Stewart*, 2 M. & Gr. 437; 9 Dowl. 366.

(3) Co. Litt. 128 a.

(4) *Ibid.* 122 b. Waiver is the proper term applicable to a female, *Burnett v. Phillips*, 2 L. M. P. 444.

(5) *Bryan v. Wagstaff*, 5 B. & Cr. 314; *Porter v. O'Meara*, 7 Dowl. 657, 725; *Levi v. Claggett*, 1 M. & W. 547; 5 Dowl. 322; *Beauclerk v. Hook*, 20 L. J. 485, Q. B.

(6) *North v. Chambers*, Barnes, 319.

(7) *Pigou v. Drummond*, 1 Bing. N. C. 354; *Hunter v. Whitfield*, 3 Bing. N. C. 878.

(8) *Johnson v. Driver*, 1 Dowl. 127; *James v. Jenkins*, 9 Moore, 589; *Biscoe v. Kennedy*, 2 Wils. 127.

(9) See *ante*, p. 530.

(10) *Braham v. Hunter*, 6 D. & L. 120.

(11) Rule Pr. 74, H. T. 1853.

(12) See *Braham v. Hunter*, 6 D. & L. 129; *Cox v. Beavan*, 8 C. B. 334.

must be fifteen days at least between the teste and the return,⁽¹⁾ and the writ must be returned on a day certain, being either the third day inclusive before the commencement of term, or between that and the third day exclusive before the last day of term, and it cannot be returned after the second term from that in which it was tested.⁽²⁾ The writ does not require to be dated on the day it is issued, nor to be indorsed with the attorney's name and abode, pursuant to 2 Will. 4, c. 39, s. 12.⁽³⁾

Form of Writ of Exigi Facias.

VICTORIA, &c., to the sheriff of , greeting. We command you that you cause the said C. D. to be demanded from county court to county court [or in London, from husting to husting], until, according to the law and custom of England, he be outlawed if he do not appear, and if he do appear then that you take him and cause him to be safely kept, so that you may have his body before us [or in C. P. our justices, or in Exch. before the barons of our Exchequer] at Westminster, on , to satisfy the said A. B. £ , which the said A. B. lately in our court of recovered against the said C. D., whereof the said C. D. is convicted, together with interest upon the said sum, at the rate of four pounds per centum per annum, from the day of , A. D. , on which day the judgment aforesaid was entered up, and whereupon you returned to , at Westminster, on , that the said C. D. was not found in your bailiwick; and how you shall have executed this our writ make appear to us [or our justices, or the barons of our Exchequer] at Westminster, on the day of aforesaid, and have you then this writ.

Witness, John Lord Campbell, at Westminster, the day of , A.D. .

The writ of *exigi facias* is taken to the sheriff's office, with instructions to be executed, which execution consists in the sheriff calling on the defendant, or exacting him to appear at five consecutive ⁽⁴⁾ county courts, or, in London, at five consecutive hustings; and the writ must be in the sheriff's possession at the time of execution.⁽⁵⁾ If, however, five such courts have not been held between the teste and return, then another writ, called an "*allocatur exigent*," must be sued out, so as to allow of the full number of five

(1) *Ibid.*; *Shirley v. Wright*, 2 Lord Raym. 775.

(2) See *Braham v. Hunter*, 6 D. & L. 129.

(3) *Lewis v. Davison*, 3 Dowl. 272; 4 M. & P. 523.

(4) The courts must be consecutive, see *Stowell v. Lord Zouch*, 1 Plowd. 371.

(5) *Nollet v. Waters*, 3 D. & R. 55.

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being made up. The latter writ is tested on the return day of the *exigi facias*.⁽¹⁾

When the *exigi facias* is executed, the sheriff returns the writ, stating that the defendant failed to appear to the five exactions, along with the judgment of outlawry signed by the coroner, and, in London, by the recorder.⁽²⁾ The outlawry is then entered on the outlawry roll, when it is complete.⁽³⁾

3. *Capias utlagatum*.]—The outlaw may then be taken on a writ of *capias utlagatum*, which issues against his person, and is stamped by the officer on the *exigent* and return being taken to him. The writ resembles a *ca. sa.*, and commands the sheriff to take the defendant and have him before the court on a certain day in term. The writ issues into any county.⁽⁴⁾ Parties are privileged from the arrest as in other cases.⁽⁵⁾ A party may be relieved by the Insolvent Debtors Court from the debt on which the outlawry is founded,⁽⁶⁾ though, it seems, the Superior Court has no power to reverse the outlawry.⁽⁷⁾ A bankrupt cannot be arrested in coming to surrender, or during his examination.⁽⁸⁾ If the defendant, when arrested, do not apply to the Insolvent Court, he must remain in prison until he reverses his outlawry.⁽⁹⁾

Special capias utlagatum.]—Where the *capias utlagatum* is intended not only to take the defendant's person but also his goods, it is called a special *capias*, and the sheriff summons a jury and holds an inquisition to inquire into the defendant's real and personal estate, and appraises the same, and thereafter returns the writ annexing the inquisition. The inquisition may be quashed if the return is bad, as for not setting out the names of the parties in whose possession the land is.⁽¹⁰⁾

If property of the defendant is found, a transcript of the writ and return is obtained from the sheriff and taken to the

(1) *Cox v. Beavan*, 8 C. B. 336.

(2) See *R. v. Almon*, 4 T. R. 202, 521; *Reynolds v. Adams*, 3 T. R. 578; *M'Taggart v. Wedderburn*, 2 D. & L. 576.

(3) See *Attorney-General v. Richards*, 9 Jur. 634.

(4) *Anon.* 1 Vent. 39; *Gilb. C. B.* 17.

(5) *Sheriff of Kent's case*, 2 C. & K. 197; *Bonner v. Stokesley*, *Crc. Eliz.* 652; *Wolf v. Denison*, 1 Salk. 319.

(6) *R. v. Insolvent Court*, 3 N. & P. 543.

(7) *Dicson v. Baker*, 1 A. & E. 853; 3 N. & M. 775.

(8) 12 & 13 Vict. c. 106, s. 112.

(9) *R. v. Wilkes*, 4 Burr. 2542, 2549.

(10) *Englar v. Annesley*, 1 Dowl. N. S. 186.

revenue side of the Exchequer, when the officer will give out a rule calling upon persons to come in and claim the property, at the expiration of which, and no other claim being made, he will give out, according to the circumstances, a *venditioni exponas*, commanding the sheriff to sell the goods, or a *levari facias*, to levy the issues and profits of the freehold land, or a *scire facias*, to recover debts due to the defendant, or a writ of sequestration.⁽¹⁾ If the amount of the proceeds does not exceed 50*l.*, the plaintiff moves the Court of Exchequer that it be paid over to him; and when the order is drawn up, the officer gives out a *subpoena*, calling on the sheriff to pay the money, which is done accordingly on the sheriff being served therewith. If the proceeds exceed 50*l.*, a petition must be presented to the Lords of the Treasury, praying that the money be paid, or if there is not sufficient money, that a lease be granted of the defendant's freehold lands, and the matter is then referred to the Solicitor of the Treasury, who, upon a certificate of the proceedings in outlawry, an affidavit of the debt sworn before a judge at chambers, the attorney's bill of costs, and the writ of *venditioni exponas* and return being laid before him, will make his report. This report is filed with the clerk of the Treasury, and who thereupon issues a warrant to the Attorney-General to consent to an order to pay the money. A motion is then made in the Exchequer for the order⁽²⁾ and *subpoena*, which being served on the sheriff, the money is paid.⁽³⁾

4. *Reversing outlawry.*]—The only mode of getting rid of the outlawry is to obtain the Queen's pardon or to reverse the outlawry. The outlawry is reversed either by writ of error or application to the court or a judge at chambers, the former being a matter of right in the outlaw, the latter discretionary in the court.

By writ of error.]—The outlaw may, as a matter of right,⁽⁴⁾ reverse the outlawry by suing out a writ of error,

⁽¹⁾ *R. v. Hind*, 1 Dowl. 286; 1 Cr. & J. 389; *R. v. Armstrong*, 3 Dowl. 760; 2 C. M. & R. 205. See *R. v. Powell*, 1 M. & W. 321.

⁽²⁾ Up to the making of the order the money is not appropriated, and the court may stay the making of the order for good cause, as where the fact of the defendant's death was disputed, *R. v. Buchanan*, 1 Cr. & M. 195.

⁽³⁾ For the forms applicable in the above proceeding, see Tidd's Forms and Chitty's Forms.

⁽⁴⁾ *Mattheies v. Gibson*, 8 East, 527. See where a judgment of outlawry was reversed 116 years afterwards, *Tynite v. R.*, 7 Q. B. 216.

coram nobis or *coram vobis*, and though this is the most tedious and expensive process, it prevents the court from imposing terms.⁽¹⁾ The writ of error lies for matter of law apparent on the record, or for matter of fact not so apparent.⁽²⁾ The provisions of the Common Law Procedure Act, 1852, as to error,⁽³⁾ do not apply to proceedings in outlawry, so that a writ of error is still necessary.⁽⁴⁾

A party must appear in person to reverse outlawry, though it is a mere irregularity, and not matter of demurrer, to assign error by attorney.⁽⁵⁾ The rule to reverse, on the ground of the defendant being abroad at the time, is absolute in the first instance.⁽⁶⁾ And where, on a traverse of the assignment, the plaintiff in error had succeeded, he was held entitled to a rule absolute in the first instance on producing the record and *postea*.⁽⁷⁾ When the judgment is reversed, the Master signs a *supersedeas*, which is entered on the record.

By application to the court or a judge.—The most usual course is to apply to the court or a judge to reverse the outlawry, which will be done in most cases at the discretion of the court, and on equitable terms, whether there is error on the record or not, on the suggestion of any solid ground, as where the defendant was in prison or abroad when the *exigent* was awarded.⁽⁸⁾ Sometimes the court will refuse to interfere, and leave the defendant to his writ of error, if he will not submit to terms,⁽⁹⁾ or if it is a second application which is made without any fresh materials,⁽¹⁰⁾ or if the ground is irregularity, and he has allowed too long a time to elapse before the application.⁽¹¹⁾ A third party cannot take

(1) *Ibid.*; *Ibbotson v. Fenton*, 1 N. & P. 782; 6 A. & E. 772. See *Craig v. Levy*, 1 Exch. 570.

(2) See *Bryant v. Wagstaffe*, 5 B. & C. 314; *Richardson v. Robinson*, 5 Taunt. 309; *Serecold v. Hampsey*, 12 East, 625.

(3) Sect. 156; see *ante*.

(4) *Arding v. Homer*, 5 May, 1856, Exch.; 25 L. J. 261; *Solomon v. Graham*, 5 E. & B. 309.

(5) *Solomon v. Graham*, 5 E. & B. 309.

(6) *Harding v. Holmes*, 11 June, 1856, Exch.; but see *Howard v. Kershaw*, 6 Exch. 541.

(7) *Beavan v. Cox*, 9 C. B. 579; 8 C. B. 334.

(8) *Houlditch v. Swinfen*, 3 Sc. 170; 5 Dowl. 37; *Levy v. Claggett*, 1 M. & W. 547; *Beauchamp v. Tomkins*, 3 Taunt. 141.

(9) *Sandford v. Wyatt*, 2 Dowl. N. S. 2.

(10) *Stulz v. Wyatt*, 6 Q. B. 666.

(11) *Anderdon v. Alexander*, 2 Dowl. 267; *Lewis v. Davison*, 3 Dowl. 272.

advantage of any irregularity in the proceedings.⁽¹⁾ And if another party make the application, he must clearly set forth in the affidavit that he applies on behalf of the outlaw.⁽²⁾ The usual terms imposed by the court are payment of the debt and costs up to judgment of outlawry;⁽³⁾ but the court will not only impose no terms where the plaintiff has abused the process of the court, but may compel the latter to pay the costs of the application.⁽⁴⁾ If an insolvent is kept in custody unnecessarily, a conditional order for setting aside the outlawry will be made.⁽⁵⁾ Where an insolvent was discharged by the Insolvent Court from the debt and costs on which the outlawry was founded, the court made a rule absolute for setting aside the judgment of outlawry, on the defendant's undertaking to execute, if required, an assignment of all property, and paying the costs of the application to set aside.⁽⁶⁾

The costs of the outlawry and reversal must in general be paid by the outlaw,⁽⁷⁾ though the plaintiff has been ordered to reverse the outlawry at his own expense, where his conduct has been oppressive⁽⁸⁾ or negligent.⁽⁹⁾ If the proceedings are set aside for an irregularity for which error will not lie, the outlaw will not be made to pay the costs.⁽¹⁰⁾ The rule, if discharged, is generally discharged with costs.⁽¹¹⁾ If the rule or order is drawn up on payment of costs, the costs must be taxed and paid before the outlawry can be reversed. A rule to set aside proceedings for irregularity was discharged with costs on a technical objection. The irregularity being admitted, the defendant,

⁽¹⁾ *Symonds v. Parmiter*, 1 W. Bl. 20; *Solly v. Forbes*, 2 Moore, 90.

⁽²⁾ *Houlditch v. Swinfen*, 5 Dowl. 36; 2 Bing. N. C. 712; *Skinner v. Carter*, 15 C. B. 472.

⁽³⁾ *Ibbotson v. Fenton*, 6 A. & E. 772; *Boddington v. DeMelfort*, 22 L. J. 245, Exch.; 8 Exch. 671.

⁽⁴⁾ *Pigou v. Drummond*, 1 Bing. N. C. 354; *Hunter v. Whitfield*, 3 Bing. N. C. 878.

⁽⁵⁾ *Nicholson v. Nicholls*, 3 Dowl. 326. See *Dickson v. Baker*, 3 N. & M. 775; 1 A. & E. 853.

⁽⁶⁾ *Baskerville v. Spry*, 5 May, 1856, Q. B.; 25 L. J. 334.

⁽⁷⁾ *Bank of England v. Reid*, 7 M. & W. 152; *Graham v. Grill*, 1 M. & Sel. 409; *Graham v. Henry*, 1 B. & Ald. 131.

⁽⁸⁾ *James v. Jenkins*, 9 Moore, 589; *Adlams v. Colebatch*, 2 Salk. 495.

⁽⁹⁾ *Roger v. Cook*, 3 B. & C. 529; *Seabrook v. Howkin*, T. Jon. 211; *Hill v. Wilkes*, 12 Mod. 413.

⁽¹⁰⁾ *Hunter v. Whitfield*, 3 Bing. N. C. 878.

⁽¹¹⁾ *Houlditch v. Swinfen*, 3 Bing. N. C. 712; 5 Dowl. 36.

though he had not paid the costs of the former motion, was allowed to make a second application for the same purpose, but only on payment of the costs of the second rule.⁽¹⁾ The outlaw, if in custody on a *capias utlagatum*, must sue out a *supersedeas*; or if his property has been sold and the proceeds are in court, he may obtain the same by a writ of *amoveas manus*.⁽²⁾

When the order or rule is obtained the proceedings must be entered on the roll, and the officer of the court will docket the same and enter the reversal thereon, and also mark the reversal in his book. The roll is then filed at the office of the court.

(¹) *Skinner v. Carter*, 16 C. B. 548.

(²) See *Frost's case*, 5 Rep. 90; *Eyre v. Woodfine*, Cro. Eliz. 278; *Pinfold v. Northey*, 2 Lev. 49. See Tidd's Forms, Chitty's Forms.

CHAPTER XLI.

AMENDMENT.

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|----------------------------|----------------------------------|
| 1. Generally. | 5. In case of misjoinder or non- |
| 2. Amendment before trial. | joinder of parties. |
| 3. At the trial. | 6. When amendment applied for. |
| 4. After the trial. | 7. How obtained. |
| | 8. Terms imposed and costs. |

1. *Generally.*—The courts have, at common law, a discretionary power to amend the proceedings in an action up to judgment.⁽¹⁾ Several old statutes also give power to the court to amend any mistake owing to the misprision of the officers of court, in writing one syllable or letter too much or too little,⁽²⁾ after as well as before judgment,⁽³⁾ though not as regards proceedings in outlawry. Mistakes and defects in pleadings, which otherwise might have been taken advantage of on demurrer, are often cured by the verdict, as where the facts set forth in the defective pleading were necessarily proved at the trial of the issue, or must be presumed to have been so. So defects are often cured by the acts of the opposite party, as by his admitting that which was defectively stated through pleading over.⁽⁴⁾ Also the mistakes and omissions in pleadings, misjoining of issue, miscontinuance and discontinuance are aided after verdict

(¹) See *Alder v. Chip*, 5 Burr. 756; 3 Bl. Com. 407; Co. Lit. 260; *R. v. Bishop of Llandaff*, 1 Str. 1011.

(²) 14 Edw. 3, c. 5, s. 1; 8 Co. 157 a.

(³) 4 Hen. 6, c. 3. See also 8 Hen. 6, cc. 12, 15; *Cheese v. Scales*, 10 M. & W. 488; 2 Dowl. N. S. 438.

(⁴) *Wilkinson v. Sharland*, 10 Exch. 724.

by the statutes of jeofails, ⁽¹⁾ and after judgment by confession by the statute 4 & 5 Anne, c. 16, s. 2. Also all defects in writs original or judicial are aided after verdict by 5 Geo. 1, c. 13. These statutes however, except 32 Hen. 8, c. 30, do not extend to penal actions.⁽²⁾ Where these statutes apply, the court treats the amendment as virtually, though it is not actually, made;⁽³⁾ and, therefore, if error is brought for the defect so cured, the plaintiff in error will get no costs.⁽⁴⁾

More ample powers of amendment were given to the courts and the judges by the Common Law Procedure Acts, 1852, 1854. By the latter act "it shall be lawful for the Superior Courts of common law, and every judge thereof, and any judge sitting at *nisi prius*, at all times to amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, if duly applied for."⁽⁵⁾ The provision in the Common Law Procedure Act, 1852, s. 222, is identical in terms, and applies to "any proceeding in civil causes," the words, "if duly applied for" at the end of the above section being omitted in that act. These sections only authorize such amendments as are necessary for determining the real question in controversy, i. e. the real question which the parties intended to have tried, not any question which may come in controversy in the course of the trial, and which was not in controversy before.⁽⁶⁾

2. *Amendment before trial.*—The cases in which the court will amend the various proceedings up to trial are stated under the respective titles of this work. It is enough to notice here the decisions of the court since the Common

⁽¹⁾ 32 Hen. 8, c. 30; 18 Eliz. c. 14; 24 Jac. 1, c. 13; 16 & 17 Car. 2, c. 8.

⁽²⁾ *Wynne v. Middleton*, 2 Str. 1227; *Richards v. Brown*, 1 Doug. 115; *Atcheson v. Everett*, Cowp. 382; *R. v. Miden*, 1 Str. 62.

⁽³⁾ 3 Bl. Com. 407.

⁽⁴⁾ *Condon v. Coulter*, Hardr. 314.

⁽⁵⁾ C. L. P. Act, 1854, s. 96.

⁽⁶⁾ *Wilkin v. Reed*, 15 C. B. 192.

Law Procedure Acts. It is entirely discretionary in the court or judge to make the amendment asked.⁽¹⁾ The court will amend an indorsement of the writ of summons, though the effect may be to take away from the defendant the defence of the Statute of Limitations.⁽²⁾ A rule for compulsory reference has been amended by inserting a clause giving the arbitrator power to give costs.⁽³⁾ Where particulars are delivered which are insufficient for not being specific, the opposite party should apply to a judge to amend them, and cannot, after the verdict against him, move for a new trial on that ground.⁽⁴⁾

3. *At the trial.*]—What the real question in controversy between the parties is, is a matter of fact to be determined by the judge at the trial from the pleadings and evidence.⁽⁵⁾ As a general rule, the court *in banc* will not interfere to review the decision of a judge at *nisi prius*, when he refuses to amend the pleadings, and where injustice has arisen, it seems, the proper course is, not to move for a new trial on that ground, but to apply to the court to amend the record.⁽⁶⁾

The judge has power to alter the form of action; thus, where an action of trespass *quare clausum fregit* had been brought, and at the trial it appeared the plaintiff was not in possession of the premises, but had let them to a tenant, the judge amended the declaration so as to meet the case of the injury to the reversion.⁽⁷⁾ In an action for not accepting a cargo, the judge amended the declaration by substituting an excuse for non-performance, instead of the averment of readiness and willingness to deliver.⁽⁸⁾ To a declaration for money had and received, the defendant pleaded that the debt was for money due from the defendant jointly with A., and that the plaintiff had already sued A. in trover and

⁽¹⁾ *Ritchie v. Van Gelder*, 9 Exch. 762.

⁽²⁾ *Cornish v. Hockin*, 1 E. & B. 602. Though particulars are indorsed on the writ, the plaintiff may, without leave of a judge, deliver fresh particulars with the declaration and proceed thereon, *Fromant v. Ashley*, 1 E. & B. 723.

⁽³⁾ *Bell v. Postlethwaite*, 5 E. & B. 695.

⁽⁴⁾ *Hull v. Bolland*, 10 June, 1856, Exch. Particulars cannot be amended, except by consent, after the cause is referred, and no power of amendment reserved to the arbitrator, *Morgan v. Tarte*, 11 Exch. 82.

⁽⁵⁾ *Wilkin v. Reed*, 15 C. B. 192.

⁽⁶⁾ *Brennan v. Howard*, 22 May, 1856, Exch. See *Tennison v. O'Brien*, 5 E. & B. 497.

⁽⁷⁾ *May v. Footner*, 5 E. & B. 505. As to the power of the judge to add a plea, see *Mitchell v. Crasswaller*, 13 C. B. 237.

⁽⁸⁾ *Tennison v. O'Brien*, 5 E. & B. 497.

recovered judgment for 150*l.*, and that the causes of action for which the plaintiff then recovered judgment included all the present causes of action. The evidence was, that the defendant and A. had wrongfully converted the plaintiff's goods by selling them, but that the defendant alone had received the proceeds, 150*l.*, that the plaintiff had sued A. in trover and recovered 100*l.* as the value of the goods at the time of the conversion. The judge was held rightly to have amended the plea by striking out the allegation that the debt was for money due from the defendant and A. jointly, and substituting that the money sued for was money received as the proceeds of the sale of the goods in the declaration mentioned.⁽¹⁾ Where the judge at the trial allowed a declaration to be amended by inserting a claim of interest, and, after an objection to the stamp, the plaintiff abandoned the claim of interest, the judge rightly gave leave to alter the record again by striking out the part inserted to which the defendant had objected.⁽²⁾ Where in ejectment on a joint demise, by H. W. and M. his wife, the proof was that the property had been devised to H. W. in trust for the sole and separate use of M., the judge properly declined to allow the declaration to be amended by striking out the name of the wife, on the ground that the proposed amendment was not warranted by 3 & 4 Will. 4, c. 42, s. 23.⁽³⁾

4. *After trial.*—The court will entertain an application to set aside the judgment even after satisfaction thereof, in order to allow the plaintiff to correct a mistake in his particulars of demand, the defendant being put in the same position as if the mistake had not been made, and the application being made within a reasonable time.⁽⁴⁾ Even after error brought, and the case has been set down for argument, the court below may make any amendment in the proceedings before the sitting day of the Court of Error.⁽⁵⁾ The court will amend a rule *nisi* for a new trial by stating the grounds more specifically.⁽⁶⁾ So, the court have allowed the defendant to amend a plea of not guilty

(1) *Buckland v. Johnson*, 15 C. B. 145.

(2) *Morgan v. Pike*, 14 C. B. 473.

(3) *Doe d. Wilton v. Beck*, 15 C. B. 329.

(4) *Cannan v. Reynolds*, 5 E. & B. 301. See also the record reformed on a motion for a new trial, *Parsons v. Alexander*, 5 E. & B. 266.

(5) *Wilkinson v. Sharland*, 11 Exch. 33.

(6) *Drayson v. Andrews*, 10 Exch. 472.

by statute, by inserting in the margin statutes necessary to justify the trespass complained of, after verdict for the defendant and a rule *nisi* to set it aside.⁽¹⁾ Where, in an action of trespass, a verdict was taken for plaintiff, subject to the award of an arbitrator, who was to have the powers of a judge at *nisi prius*, and to enter the verdict as he thought fit, and the verdict having been entered for the plaintiff for less than 40s., and no certificate being given, it was held the plaintiff was entitled to have the *postea* amended, by striking out the words "and for those costs to 40s."⁽²⁾ Where, in an action against the maker of a non-negotiable note, the defendant pleaded *non fecit*, and, it appeared, the note had been lost, but that defence could not be set up under the plea; on a motion for a new trial, the court refused leave to amend by pleading the loss of the note, for, before the defendant could do so, he ought first to show that a non-negotiable note must be produced at the trial.⁽³⁾

The court cannot *amend the verdict* of the jury in point of substance,⁽⁴⁾ yet they may give it its legal effect, as where, by mistake, single damages were taken for treble damages,⁽⁵⁾ or single value for treble value in an action for not setting out tithes.⁽⁶⁾ If the jury exceed the damages laid in the declaration, the court may allow the plaintiff to enter a *remittitur* as to the excess.⁽⁷⁾ The court will also allow judgment to be entered as amended in certain cases in *replevin* under 17 Car. 2, c. 7, s. 2.⁽⁸⁾ The court may also, at common law, amend the *postea* where there has been a mistake in recording the verdict, and, if necessary, refer to the judge's notes for that purpose,⁽⁹⁾ as where the associate entered 1*d.* damages instead of 174*l.*,⁽¹⁰⁾ where no notice

(1) *Edwards v. Hodges*, 15 C. B. 477.

(2) *Cooper v. Pegg*, 16 C. B. 264.

(3) *Charnley v. Grundy*, 14 C. B. 608.

(4) *Spencer v. Goter*, 1 H. Bl. 78; *Sandford v. Porter*, 2 Chitt. R. 351.

(5) *Baldwin and Turner's case*, Godb. 245.

(6) *Sandford v. Clarke*, 2 Chitt. R. 352.

(7) *Usher v. Dansey*, 4 M. & Sel. 94; *Pickwood v. Wright*, 1 H. Bl. 643.

(8) *Rees v. Morgan*, 3 T. R. 349; *Gamon v. Jones*, 4 T. R. 509.

(9) *Richardson v. Mellish*, 11 Moore, 104; 1 B. & C. 819; *Per Lord Truro, L. C. in Marianski v. Cairns*, 1 Macq. Ap. C. 212, 766; *Pechell v. Watson*, 8 M. & W. 691; *R. v. Virrier*, 12 A. & E. 317; *Reece v. Lee*, 7 Moore, 269.

(10) Bull. N. P. 320; *Newcombe v. Green*, 1 Wils. 33.

was taken of one of the issues,⁽¹⁾ where a general verdict was entered by mistake,⁽²⁾ some of the counts being bad,⁽³⁾ if it clearly appear the damages were calculated on evidence given on the good counts only.⁽⁴⁾ So, where there has been a general verdict with contingent damages, or an issue in law afterwards found for the defendant, the judge may amend the *postea*.⁽⁵⁾ The application to amend the *postea* should be made to the judge who tried the cause,⁽⁶⁾ and it may be made even after error brought,⁽⁷⁾ though the lapse of a great time may be a ground for refusal.⁽⁸⁾ In such cases a court of error will not question the discretion of the judge.⁽⁹⁾

The court has power at common law to amend the *judgment* both in substance and form,⁽¹⁰⁾ even after error brought, though not after judgment in error.⁽¹¹⁾ Thus the court have altered a judgment *de bonis propriis* against an executor into one *de bonis testatoris*.⁽¹²⁾ They will also amend for clerical errors.⁽¹³⁾

(1) *Petrie v. Hannay*, 3 T. R. 659; *Isles v. Turner*, 3 Dowl. 211.

(2) *Wallis v. Goddard*, 3 Sc. N. R. 295.

(3) *Eddowes v. Hopkins*, 1 Doug. 376; *Taylor v. Whitehead*, 2 id. 746. See, as to a penal action, *Holloway v. Bennett*, 3 T. R. 448; *Hardy v. Cathcart*, 5 Taunt. 2.

(4) *Empson v. Griffin*, 11 A. & E. 186; *Williams v. Breedon*, 1 B. & P. 329; *Spicer v. Teesdale*, 2 B. & P. 49.

(5) *Ferguson v. Mahon*, 11 A. & E. 179.

(6) *Newton v. Harland*, 1 M. & Gr. 956; 9 Dowl. 65; 1 Sc. N. R. 503; *Harrison v. King*, 1 B. & Ald. 163.

(7) *Richardson v. Mellish*, 1 B. & C. 819; 11 Moore, 109; 3 Bing. 334; *Marianski v. Cairns*, 1 Macq. Ap. C. 212, 776.

(8) *Harrison v. King*, 1 B. & Ald. 163.

(9) *Sandford v. Alcock*, 10 M. & W. 689; 2 Dowl. N. S. 463; *Newton v. Harland*, 1 Sc. N. R. 503; *Daintry v. Brocklehurst*, 3 Exch. 691.

(10) *Usher v. Dansey*, 4 M. & Sel. 94; *Simmons v. King*, 2 D. & L. 786.

(11) *Jackson v. Galloway*, 1 C. B. 280. The court may also, by statute, amend for misprision of the officers of court; 8 Hen. 6, c. 12; 8 Hen. 6, c. 15.

(12) *Short v. Coffin*, 5 Burr. 2733; *Green v. Bennett*, 1 T. R. 783; *Dunbar v. Hitchcock*, 3 M. & Sel. 591. But the court have refused to amend a judgment against an executor where it was to his prejudice, *Burroughs v. Stevens*, 5 Taunt. 554; *Prince v. Nicholson*, 6 Taunt. 45.

(13) *Paddon v. Bartlett*, 3 A. & E. 887; *Blackey v. Birmingham*, 2 Str. 1132; *Slicer v. Thompson*, id. 1156.

NOTICE.

This Part, completing the **NEW PRACTICE OF THE COMMON LAW**, is presented to the Subscribers *gratuitously*. It was intended to have formed a portion of the last Part, but as the *New County Courts Practice* was much in request, it was deemed to be more convenient to the reader to be supplied with that without the delay that would have occurred had it waited for the completion of this one.

The next Part is nearly ready.

stances, the court or judge may take into consideration additional special circumstances, though not applicable to the party originally chargeable.⁽¹⁾ Where a trustee, executor, or administrator, has paid or is chargeable with the bill, any party interested in the estate, out of which it is or is to be paid, may apply to the Lord Chancellor, or Master of the Rolls, to refer the bill to taxation, &c.;⁽²⁾ and such third party may apply for a copy of the bill of costs on payment of the costs of a copy; but no bill previously taxed and settled shall be again referred, unless under special circumstances.⁽³⁾ Payment of the bill does not preclude an application to tax if the special circumstances warrant the order, and the application be made within twelve calendar months after payment.⁽⁴⁾ An agreement to charge costs only out of pocket does not preclude taxation.⁽⁵⁾ Giving security for the amount of the bill is equivalent to payment for this purpose.⁽⁶⁾ The Master to whom the bill is referred for taxation may require any taxing Master of another court to tax part thereof.⁽⁷⁾

“All applications made under this act to refer any such bill as aforesaid to be taxed and settled, and for the delivery of such bill, and for the delivering up of deeds, documents, and papers, shall be made in the matter of such attorney or solicitor; and upon the taxation and settlement of any such bill, the certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due, and directed to be paid, may be enforced according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such court, or any judge thereof, to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such court or judge shall deem proper.”⁽⁸⁾

⁽¹⁾ 6 & 7 Vict. c. 73, s. 38.

⁽²⁾ *Ibid.* s. 39.

⁽³⁾ *Ibid.* s. 40.

⁽⁴⁾ *Ibid.* s. 41.

⁽⁵⁾ *Re Ransom*, 18 Beav. 220. See on the other hand an agreement of the client not to seek taxation, *Re Vann*, 15 C. B. 341.

⁽⁶⁾ *Re Turner*, 5 De G. M. & G. 540. See also *Re Ingle*, 25 L. J. 169, Ch.; *Re Currie*, 9 Beav. 602.

⁽⁷⁾ 6 & 7 Vict. c. 73, s. 42.

⁽⁸⁾ *Ibid.* s. 43.

2. *Form and contents of bill of costs.*—The kind of business, in respect of which the bill is taxable, though including conveyancing and other matters transacted out of court, must yet be done by the attorney in his character as an attorney.⁽¹⁾ Thus, if the attorney acted as a banker,⁽²⁾ a steward of a manor,⁽³⁾ an advocate,⁽⁴⁾ or a mere lender of money,⁽⁵⁾ unless, perhaps, the money was applied towards the action or legal proceedings, the bill is not taxable.⁽⁶⁾ Where the attorney has claims for business, not taxable as well as taxable, he may recover for the non-taxable business without having delivered a bill.⁽⁷⁾ It seems the bill should not contain abbreviations difficult to be understood by laymen,⁽⁸⁾ nor slump the items.⁽⁹⁾ A mistake in the date of an item, unless it mislead, is not fatal.⁽¹⁰⁾ Where part of the costs have been recovered from the opposite party, these should be included and credited in the client's bill.⁽¹¹⁾

It should appear on the face of the bill, or the letter, who is the person chargeable; or, at least, this should appear from the envelope inclosing the bill.⁽¹²⁾ The name of the common law court in which the business was done should be expressly stated, or, at least, this should appear by implication; but the omission seems immaterial, unless the party is misled.⁽¹³⁾ It should, however, appear, whether it was a court of law or equity.⁽¹⁴⁾ The bill may be good in part,

(1) *Smith v. Dimes*, 4 Exch. 32; 7 D. & L. 78.

(2) Per Littledale J., *Wardle v. Nicholson*, 4 B. & Ad. 475.

(3) *Allen v. Aldridge*, 13 L. J. 155, Ch.

(4) *Re Simons*, 2 D. & L. 500.

(5) *Hemming v. Wilton*, 4 C. & P. 318; *Sparrow v. Johns*, 6 Dowl. 554; *Prothero v. Thomas*, 6 Taunt. 196.

(6) *Latham v. Hide*, 1 Cr. & M. 128; *Smith v. Taylor*, 7 Bing. 259; 1 Dowl. 212.

(7) *Wardle v. Nicholson*, 4 B. & Ad. 469; *Waller v. Lacy*, 1 Sc. N. R. 186.

(8) See *Froud v. Stillard*, 4 C. & P. 51.

(9) *Drew v. Clifford*, 2 C. & P. 69; 1 Ry. & M. 280; *Rowson v. Earle*, 4 C. & P. 44.

(10) *Williams v. Barber*, 4 Taunt. 806.

(11) *Waller v. Lacey*, 1 Sc. N. R. 186; 1 M. & Gr. 54.

(12) *Lucas v. Roberts*, 11 Exch. 41; *Gridley v. Austen*, 16 Q. B. 504; *Taylor v. Hodson*, 3 D. & L. 115. Where a director was sued, the name of the company was held sufficient, *Daubney v. Phipps*, 18 L. J. 338, Q. B.

(13) *Cooke v. Gillard*, 1 E. & B. 26; *Anderson v. Boynton*, 13 Q. B. 308; *Dimes v. Wright*, 8 C. B. 831; *Sargent v. Gannon*, 7 C. B. 742.

(14) *Roy v. Turner*, 26 L. T. 150; *Ivimey v. Marks*, 16 M. & W. 843.

and the plaintiff may recover *pro tanto*.⁽¹⁾ No charge for drawing or copying the bill is allowed.⁽²⁾ The client may waive the want of signature to the bill.⁽³⁾

3. *Delivery of bill and enforcing delivery.*—The statute prescribes the mode of delivery, and the time when. The delivery may be to one of several persons jointly chargeable,⁽⁴⁾ or to an agent impliedly authorized to receive it.⁽⁵⁾ Delivery to the attorney, appointed after a change of attorney, has been held sufficient.⁽⁶⁾ Where the bill was delivered before the client died, a redelivery to the executor is not necessary.⁽⁷⁾ The delivery at the last known place of abode is good, though the client had previously removed, if the removal was not known by the attorney.⁽⁸⁾ The "month" means a calendar month,⁽⁹⁾ and is counted exclusive of the day of delivery and of the day of commencing the action.⁽¹⁰⁾ The defence of non-delivery of the bill must be specially pleaded,⁽¹¹⁾ and the non-delivery is no ground for staying the proceedings⁽¹²⁾ or discharging the client after his arrest.⁽¹³⁾ The delivery of the bill is merely a condition precedent to the bringing of the action, but otherwise does not affect the debt, which may, accordingly, be proved in bankruptcy,⁽¹⁴⁾ or set off against an action by the client,⁽¹⁵⁾ without any previous delivery.

(1) *Cooke v. Gillard*, 1 E. & B. 26; *Wardle v. Nicholson*, 4 B. & Ad. 475. But see *Ivimey v. Marks*, 16 M. & W. 843.

(2) *Jones v. Roberts*, 2 D. & L. 374.

(3) *Re Gedye*, 14 Beav. 56.

(4) *Finchett v. Howe*, 2 Camp. 277; *Eggington v. Cumberledge*, 1 Exch. 271.

(5) *Daubney v. Phipps*, 2 L. M. & P. 180; *Re Bush*, 8 Beav. 66.

(6) *Vincent v. Slaymaker*, 12 East, 372. See, as to delivery to a managing committeeman, *Edwards v. Lawless*, 6 C. B. 329; *Gridley v. Austen*, 6 Q. B. 504; 18 Q. B. 514; *Eggington v. Cumberledge*, 1 Exch. 271; delivery to a servant, *Macgregor v. Keily*, 3 Exch. 794; *Tate v. Hitchings*, 7 C. B. 875.

(7) *Reynolds v. Caswell*, 4 Taunt. 193.

(8) *Wadson v. Smith*, Stark. 324.

(9) 6 & 7 Vict. c. 73, s. 48.

(10) *Blunt v. Heslop*, 8 A. & E. 577; 3 N. & P. 553.

(11) *Lane v. Glenny*, 2 N. & P. 258; *Robinson v. Rowland*, 6 Dowl. 271.

(12) *Harper v. Leach*, Barnes, 123.

(13) *Tomlinson v. Clark*, 4 Moore, 4.

(14) *Ex parte Prideaux*, 1 Gl. & J. 28; *Eicks v. Nokes*, 1 M. & M. 303; *Harrison v. Turner*, 10 Q. B. 482.

(15) *Lester v. Lazarus*, 2 C. M. & R. 667

So, if a promissory note be given for the costs, it may be sued on by the attorney without any delivery of the bill.⁽¹⁾ The court, however, in these cases may order the bill to be taxed.⁽²⁾

If the attorney has not delivered his bill, the party chargeable may apply to the court or a judge to order the attorney to deliver the bill.⁽³⁾ It seems, no time is limited for the application, where the party directly chargeable applies.⁽⁴⁾ So a third party, liable to pay the bill, may apply,⁽⁵⁾ but not a mere volunteer who pays the bill,⁽⁶⁾ nor one remotely interested,⁽⁷⁾ as a ratepayer, seeking to tax the account of the surveyor of highways.⁽⁸⁾ The application is generally made to a judge at chambers. An affidavit is in general necessary, especially if the party is not directly chargeable. It seems the delivery and taxation will not be ordered by one order.⁽⁹⁾ The order generally specifies a time within which the bill must be delivered, and orders the attorney to give credit for all sums paid to account.⁽¹⁰⁾ After the order is duly drawn up and served, if the attorney disobeys it, it can be made a rule of court; and after personally serving the rule, and making a specific demand for delivery in the usual way, an attachment may be obtained.⁽¹¹⁾ No action lies on the judge's order.⁽¹²⁾ If the attorney do not deliver the right bill, a fresh order should be obtained and costs should be asked. The attachment cannot be moved for on the last day of term.⁽¹³⁾

4. *The taxation.*—If the party chargeable, or the third party, do not apply to tax the bill, it will sometimes be of

(1) *Jeffreys v. Evans*, 3 D. & L. 62; 14 M. & W. 210. But he cannot recover on an account stated, *Brooks v. Bockett*, 9 Q. B. 847.

(2) *Williams v. Frith*, 1 Doug. 199.

(3) 6 & 7 Vict. c. 73, s. 37. The court has this power at common law, *Clarkson v. Parker*, 7 Dowl. 87. An outlaw is not allowed to apply, *Re Ford*, 1 B. C. C. 88; *Re Maunder*, 6 Q. B. 867.

(4) See s. 37; *Tanner v. Lea*, 5 Sc. N. R. 237; 4 M. & Gr. 617.

(5) 6 & 7 Vict. c. 73, s. 38.

(6) *Re Saunders*, 13 L. J. 161, Ch.; *Re Carew*, 14 id. 100.

(7) *Re Pecke*, 5 Beav. 406.

(8) *Re Barker*, 14 M. & W. 720.

(9) *R. v. Weston*, 8 Jur. 1122. See *Clarkson v. Parker*, 7 Dowl. 87.

(10) *Randall v. Ikey*, 4 Dowl. 682.

(11) See *ante*, p. 1133; *R. v. Baster*, 7 D. & L. 298; *Re Cattlin*, D. & L. 566. 18 Beav. 5106; 7 C. B. 136; *Potter v. Back*, 8 Dowl. 872.

(12) *Dent v. Basham*, 9 Exch. 469, *ante*, p. 1112.

(13) *Ashmore v. Ripley*, 2 Sc. N. R. 203, 582.

advantage to the attorney to apply himself to do so, as he thereby can obtain a judge's order for payment, and thus recover the debt without the formality of an action. The bill must be delivered, before it can be ordered for taxation, but it need not be signed.⁽¹⁾ The special circumstances authorizing an application to the court by the party chargeable after twelve months, mean matters come recently to the knowledge of the party.⁽²⁾ The special circumstances authorizing taxation after payment are such as fraud, or where the payment was with a view to get possession of title deeds.⁽³⁾

The application may be made though the payment was after action brought,⁽⁴⁾ and no agreement of the parties that the payment shall be a final settlement will prevent the court ordering taxation.⁽⁵⁾ But the court has refused taxation after payment, where the only special circumstance was non-payment of counsel's fees.⁽⁶⁾ The court cannot order taxation after the twelve months from payment.⁽⁷⁾ Where the payment was by a promissory note, the twelve months date from the time when the note was paid.⁽⁸⁾

The application may, it seems, be made to any of the common law courts, where the business was transacted in any of them;⁽⁹⁾ but it is usual to apply, in the first instance, to a judge at chambers.⁽¹⁰⁾ There should be an affidavit, if the application is to the court, especially if there are special circumstances. The summons or rule must be entitled "In the matter of A. B.," as directed by the statute 6 & 7 Vict. c. 73, s. 43.⁽¹¹⁾ The rule or order should contain the particulars shown by the statute. An order for the taxation and payment, after a previous order to change

(1) *Billing v. Coppock*, 1 Exch. 14; 5 D. & L. 126; *Re Pendor*, 9 Jur. 339; *Young v. Walker*, 16 M. & W. 446.

(2) *Re Whicher*, 13 M. & W. 549; 2 D. & L. 407.

(3) *Re Dearden*, 9 Exch. 210; *Re Barrow*, 17 Beav. 547; *Ex parte Turner*, 5 De G. M. & G. 540.

(4) *Re Wilton*, 13 L. J. 17, Q. B.

(5) *Ex parte Bass*, 17 L. J. 226, Ch.; *Tanner v. Lea*, 5 Sc. N. R. 237.

(6) *Re Wilton*, 13 L. J. 19, Q. B.

(7) *Ibid.*; *Binns v. Hey*, *id.* 28; 1 D. & L. 661; *Re Downes*, 13 L. J. 159, Q. B.

(8) *Re Harries*, 13 M. & W. 3; *Re Peach*, 2 D. & L. 33.

(9) *Re Barber*, 3 D. & L. 244; 14 M. & W. 720. See *Bush v. Sayer*, 2 D. & L. 602; 8 Sc. N. R. 756.

(10) *Bassett v. Giblett*, 2 Dowl. 650.

(11) *Re Hair*, 2 D. & L. 269.

the attorney, cannot be applied for *ex parte*.⁽¹⁾ Where the order is, that "upon payment" the attorney shall deliver up deeds, &c., this does not bind the client to pay the amount of the costs.⁽²⁾ If the client does not admit the retainer, he should have his right to dispute it specially reserved in the order,⁽³⁾ but an order to tax only part of the business done, does not preclude him disputing the retainer as to the rest.⁽⁴⁾

When the order is made, an appointment from the Master should be got, and marked on it, and a copy served on the opposite attorney. If the appointment is not obtained, the other party should proceed with the taxation.⁽⁵⁾ One appointment only is necessary for proceeding to taxation.⁽⁶⁾ After waiting half an hour, if the other party do not attend, the Master may tax the bill *ex parte*.⁽⁷⁾ The Master, on taxation, under a common order, may disallow unnecessary items,⁽⁸⁾ or items incurred when the attorney was uncertificated,⁽⁹⁾ but cannot give interest if not specially ordered,⁽¹⁰⁾ and cannot enter into questions about negligence,⁽¹¹⁾ or a special agreement to charge only for costs out of pocket,⁽¹²⁾ though he may, in his discretion, allow charges according to it.⁽¹³⁾ Where the bill includes business done in other courts, the Master may, in his discretion, refer such part to the officer of that court, but he is not bound to do so, or to adopt the taxation.⁽¹⁴⁾ The party complaining of the taxation in the other court should apply to the court, or a judge of the court, ordering the taxation.⁽¹⁵⁾ When the Master taxes the bill, he makes his *allocatur* and delivers it to the party in whose favour the taxation is made, and this *allocatur*

(1) *Gillow v. Ryder*, 15 C. B. 729.

(2) *Price v. Philcox*, 7 Dowl. 559.

(3) *Re Payne*, 5 C. B. 407; *Re Thurgood*, 19 Reav. 541.

(4) *Mills v. Rivett*, 1 A. & E. 856; *White v. Milner*, 2 H. BL 357.

(5) *Sheriff v. Gresley*, 4 A. & E. 338.

(6) Rule Pr. 60, H. T. 1853.

(7) 6 & 7 Vict. c. 73, s. 37; Rule Pr. 154, H. T. 1853.

(8) *Williams v. Nicholas*, 1 Dowl. N. S. 841.

(9) *Re Angell*, 12 Jur. 961.

(10) *Berrington v. Phillip*, 1 M. & W. 48.

(11) *Jones v. Roberts*, 2 Dowl. 656; *Matchett v. Parke*, 9 M. & W. 767.

(12) *Evans v. Tayler*, 2 Dowl. 349; *Re Stretton*, 3 D. & L. 278.

(13) *Drax v. Scroope*, 2 B. & Ad. 581; *Re Masters*, 4 Dowl. 18. See *Eyre v. Shelley*, 8 M. & W. 154; 1 Dowl. N. S. 83, as to discretionary charges in the bill.

(14) 6 & 7 Vict. c. 73, s. 42; *Re Sudlow*, 18 L. J. 182, Ch.; *Wilson v. Gutteridge*, 4 D. & R. 736; *Re Jones*, 1 Dowl. 424.

(15) *Ibid.*; *Borradaile v. Nelson*, 23 L. J. 159, C. P.

is final, unless the court or a judge direct a review of the taxation.⁽¹⁾ A review of the taxation is seldom granted, unless the Master has exceeded his authority or made some mistake in a matter of fact.⁽²⁾ An affidavit of the circumstances should, generally, be made, especially if the application is to the court, and it should state the amount in dispute.⁽³⁾

The costs of the taxation are regulated by the act 6 & 7 Vict. c. 73, s. 37, which is imperative; thus, even though the attorney is, meanwhile, discharged by the insolvent court, he is personally liable for the costs, if more than one-sixth were taxed off.⁽⁴⁾ The only case, in which the court or judge has a discretionary power as to these, is where the application is made under special circumstances.⁽⁵⁾ If the taxation by arrangement does not take place, or the Master's *allocatur* is taken for an agreed sum, then there can be no costs allowed.⁽⁶⁾ If the client, on having the bill taxed, reserve his right to dispute the retainer, he is liable for the costs, whatever be the result of the point reserved.⁽⁷⁾

Whether the bill after taxation is less by a sixth part within the meaning of the statute, does not always depend on the mere arithmetical difference. Though, in general, it is immaterial on what ground the Master came to the conclusion that the item or reduction must be struck out,⁽⁸⁾ yet, it seems, if a whole branch of the bill is struck out because some other party is liable for it, this is not to be reckoned as a deduction.⁽⁹⁾ So items which are not taxable are not to be reckoned,⁽¹⁰⁾ as an item setting forth the amount received by him from his client to settle the action and pay the opposite party;⁽¹¹⁾ yet, if a sum given by the client to be spent in the cause as disbursements, it may be

(1) 6 & 7 Vict. c. 73, s. 43. See *Doe v. Webber*, 2 A. & E. 448; *Re Lawless*, 6 C. B. 123, where by consent the Master decided the disputed question of retainer; *Phillips v. Broadley*, 9 Q. B. 744.

(2) *Morris v. Hunt*, 1 Chitt. R. 544; *Cliffe v. Prosser*, 2 Dowl. 21. (3) *Re Dearden*, 9 Exch. 210.

(4) *Whalley v. Williamson*, 6 M. & Gr. 269; 6 Sc. N. R. 948.

(5) *Ex parte Woollett*, 12 M. & W. 504; 1 D. & L. 593.

(6) *Laurie v. Bartlett*, 1 D. & L. 730.

(7) *Re Shaw*, 2 L. M. P. 214; *Re Thurgood*, 19 Beav. 541.

(8) *Morris v. Parkinson*, 2 C. M. & R. 178; 3 Dowl. 744; *Swiburne v. Hewitt*, 7 Dowl. 314.

(9) *Ibid.*; *White v. Milner*, 2 H. Bl. 357; *Mills v. Revett*, 1 A. & E. 856; 3 N. & M. 767.

(10) *Re Remnant*, 11 Beav. 603.

(11) *Woollison v. Hodgson*, 2 Dowl. 360.

included.⁽¹⁾ Where the Master strikes out some items and adds others, the latter must first be added to the gross amount, and then the former deducted, in order to estimate the one-sixth.⁽²⁾ The costs of the taxation are recovered upon the order, which, either expressly or impliedly, orders the party liable to pay them; and, it seems, they cannot be recovered by action, nor can be set off.⁽³⁾ When the order referring a paid bill orders the attorney to refund the surplus, the remedy is either by attachment or by execution under 1 & 2 Vict. c. 110, s. 18, and no action lies.⁽⁴⁾ Where, however, this clause, ordering to refund, was omitted, the court has refused to supply it.⁽⁵⁾

Action for the bill of costs.—The action for the bill of costs does not depend on its taxation, unless the order to tax has been obtained and stays the action. Where the client delays to tax after obtaining the order, the attorney should himself tax the bill;⁽⁶⁾ but when once taxed and the month has expired, he can commence an action, though the costs of the reference are unsettled, or an application to review is pending.⁽⁷⁾ The declaration is generally in the common counts for work and labour and materials, money paid, and an account stated. Proof of the retainer is necessary on the plea of *nunquam indebitatus*, and may be by producing the writing, if any, or by admissions of the client, or directions being given by him, or by producing the order to tax obtained by the client, and the Master's allocatur, unless the order specially reserve the question of retainer. Under the same plea the main items of the bill must be proved, if the bill has not been taxed. The defendant may set up as a defence, that the business or action has not been completed, or was wholly useless to him, or that the plaintiff agreed to charge nothing for his trouble, or only costs out of pocket which have been paid.⁽⁸⁾

(1) *Hindle v. Shackleton*, 1 Taunt. 536; *Harrison v. Ward*, 4 Dowl. 39; *Franklin v. Featherstonehaugh*, 3 N. & M. 174. See, where the amount of a previous taxed bill was inserted, *Mills v. Revett*, 1 A. & E. 856; *Hays v. Trotter*, 5 B. & Ad. 1106; 3 N. & M. 174.

(2) *Re Hartley*, 2 Jur. N. S. 268.

(3) *Field v. Bryant*, 5 B. & Ad. 357; *Phillips v. Broadley*, 9 Q. B. 744.

(4) *Gower v. Poppin*, 2 Stark. 85; *Phillips v. Broadley*, 9 Q. B. 744.

(5) *Peace v. Jones*, 8 Dowl. 314.

(6) *Sheriff v. Gresly*, 4 A. & E. 338; 5 N. & M. 491.

(7) *Hewitt v. Bellott*, 2 B. & Ald. 745.

(8) See, where the attorney was retained at a yearly salary instead of

The defendant may plead specially that the plaintiff was uncertificated or unqualified, in which case the onus of proving it is on the defendant;⁽¹⁾ or that the bill has not been duly delivered, in which case the plaintiff must prove delivery.⁽²⁾ The Statute of Limitations does not in general run against the costs until the suit is terminated.⁽³⁾

(a) *Execution on rule for bill of costs, or attachment.*—If the bill has been taxed, the attorney may, instead of bringing an action, issue execution on the order of the judge, or the court or judge may order judgment to be entered up for the amount.⁽⁴⁾ No writ need be issued for the latter purpose.⁽⁵⁾ An attachment may also lie against the client for disobedience of the order, but an order directly commanding him to pay must first be obtained.⁽⁶⁾

(b) *Lien on papers of client.*—An attorney cannot hold papers or deeds of his client, or take a bond or bill for future costs to be incurred, and if he does so the court will order him to deliver these up.⁽⁷⁾ Where they are given or held partly for costs already incurred, and partly for future costs, the lien or security is ineffectual as regards the latter.⁽⁸⁾

Where costs have already been incurred, the attorney has a lien for the general balance upon all the papers and deeds of his client, which have come into his hands in the course of his employment as attorney,⁽⁹⁾ in the absence of any

his bill of costs, *Emmens v. Elderton*, 4 H. L. Cas. 624; see also *Thomas v. Mayor of Swansea*, 2 Dowl. N. S. 470.

⁽¹⁾ *Berryman v. Wise*, 4 T. R. 367; *Pearce v. Whale*, 7 D. & R. 512; 5 B. & C. 38. It is no defence that the work was done on Sunday, *Peate v. Dicken*, 3 Dowl. 171.

⁽²⁾ *Culling v. Treweek*, 6 B. & C. 394; *Fyson v. Kemp*, 6 C. & P. 71; the bill may be proved by a copy without serving a notice to produce, and the copy need not be compared by two persons reading alternately, *ibid.*

⁽³⁾ *Martindale v. Falker*, 2 C. B. 706; as to continuous items, see *Phillips v. Broadley*, 9 Q. B. 744. ⁽⁴⁾ 6 & 7 Vict. c. 73, s. 43.

⁽⁵⁾ *Griffiths v. Hughes*, 16 M. & W. 809; 4 D. & L. 719.

⁽⁶⁾ See *ante*, "Judge's summons and order."

⁽⁷⁾ *Jones v. Hunter*, 1 Dowl. 462; *Jones v. Tripp*, Jac. 322; *Newman v. Payne*, 4 Bro. C. C. 350; nor is an agreement pending litigation to pay compound interest good, *Re Moss*, 17 Beav. 346.

⁽⁸⁾ *Holdsworth v. Wakeman*, 1 Dowl. 532; *Jefferys v. Evans*, 3 D. & L. 54.

⁽⁹⁾ *Stevenson v. Blakelock*, 1 M. & Sel. 535; *Howell v. Harding*, 8 East, 362; *Astley v. Fisher*, 6 C. B. 572; *Re Broomhead*, 6 D. & L. 52.

stipulation to the contrary.⁽¹⁾ If the work was not done by the attorney as an attorney, there is no lien; as where he acted merely as town clerk,⁽²⁾ or steward of a manor.⁽³⁾ So there is no lien, if the paper did not come into his hand in the course of his employment; as where he was entrusted with the paper, not for business, but merely to show to a third party,⁽⁴⁾ or got it as the attorney of a third party to whom it was lent;⁽⁵⁾ or where it was a will given only to be proved,⁽⁶⁾ or where it is a deed which he had prepared for execution, and it has been executed.⁽⁷⁾ The lien is valid against the client, and all claiming under him,⁽⁸⁾ but is ineffectual against third parties having a title paramount.⁽⁹⁾ There is no lien on a partner's private deed for business done for the firm.⁽¹⁰⁾ The lien ceases when the client is convicted of felony,⁽¹¹⁾ or is ordered by a court to deliver up the deeds.⁽¹²⁾ No lien can be acquired after the client's bankruptcy,⁽¹³⁾ or after a judgment against him.⁽¹⁴⁾ The lien may be waived, as by a new arrangement, or by accepting a security for the costs.⁽¹⁵⁾ The attorney is not bound to produce the deeds under a subpoena, but should attend and state the reason,⁽¹⁶⁾ nor is he bound to give copies of them.⁽¹⁷⁾ Where the attorney is changed, the former attorney may sometimes be ordered to hand over the papers

(1) *Ex parte Sterling*, 16 Ves. 258.

(2) *R. v. Williams*, 5 A. & E. 423; 6 N. & M. 839; but if the business comes within an attorney's duty, and he is an attorney, the lien exists, *Taunton v. Goforth*, 6 D. & R. 384.

(3) *Champerdown v. Scott*, 6 Mad. 93.

(4) *Balch v. Symes*, 1 T. & Russ. 87; but see, where the accidental obtaining of the deed was held to be in the course of business, *Stevenson v. Blakelock*, 1 M. & S. 535.

(5) *Hollis v. Claridge*, 4 Taunt. 807.

(6) *Lord v. Wormleighton*, Jac. 580.

(7) *Anon.* 1 Ld. Raym. 738; see *Green v. Farmer*, 4 Burr. 2218.

(8) *Ogle v. Storey*, 4 B. & Ad. 735; *Ozendale v. Esdaile*, 2 Y. & J. 493; *Hollis v. Claridge*, 4 Taunt. 807; *Wakefield v. Newton*, 6 Q. B. 276.

(9) *Lightfoot v. Keane*, 1 M. & W. 745; *Ex parte Nisbet*, 2 Sch. & L. 279.

(10) *Turner v. Deane*, 3 Exch. 836.

(11) *Sullins v. Blake*, 4 Dowl. 263.

(12) *Bell v. Taylor*, 8 Sim. 216.

(13) *Ex parte Lee*, 2 Ves. jun. 285; *Re Dean*, M. G. & De G. 438.

(14) *Blunder v. Desart*, 1 Dr. & W. 405.

(15) *Cowell v. Simpson*, 16 Ves. 275; *Hewson v. Guthrie*, 2 Bing. N. C. 755; but it may revive, if the security prove fruitless, *Stevenson v. Blakelock*, 1 M. & Sel. 535.

(16) *Doe v. Ross*, 7 M. & W. 102.

(17) *Lord v. Wormleighton*, Jac. 580.

to his successor, but his lien will be reserved.⁽¹⁾ So he may be ordered to produce them, if he is charged with improper conduct in respect of them.⁽²⁾ The court will not stay a cause, till the attorney's costs have been paid.⁽³⁾ Where the attorney is compelled to bring an action in respect of the costs for which he holds the lien, the lien extends also to the costs of the action.⁽⁴⁾ The attorney has a lien also upon all moneys of his client coming into his hands as such attorney, and he may retain them for the costs actually due.⁽⁵⁾ The same rules apply to this lien as in the case of papers and deeds. The attorney cannot appropriate the money to any particular part of his bill of costs.⁽⁶⁾ So the attorney has a *quasi* lien on a judgment in the client's favour,⁽⁷⁾ or an award,⁽⁸⁾ *i. e.* the court may order the judgment or award to stand as a security for the attorney's costs,⁽⁹⁾ especially if the attorney has given notice of his lien to the opposite party,⁽¹⁰⁾ or there is collusion between the client and the opposite party.⁽¹¹⁾ Yet the client, if not acting collusively, may give a release to his opponent, and thus end the action irrespective of the attorney's lien,⁽¹²⁾ though he sued *in formâ pauperis*.⁽¹³⁾ So the attorney cannot by reason of his lien prevent his client from compromising the action before verdict or judgment,⁽¹⁴⁾ or after

(1) *Heslop v. Metcalfe*, 3 My. & C. 183; *Vansandau v. Brown*, 2 M. & Sc. 543; 9 Bing. 402.

(2) *Balch v. Symes*, 1 T. & Russ. 87.

(3) *Magrath v. Muskerry*, 1 Ridg. 477.

(4) *Gray v. Graham*, 26 L. T. 111; 2 Macq. Ap. C.

(5) *Miller v. Alter*, 3 Exch. 799; *Welch v. Hole*, 1 Doug. 238; *Davies v. Lowndes*, 3 C. B. 823.

(6) *Waller v. Lacey*, 1 M. & Gr. 54; 8 Dowl. 563.

(7) *Middleton v. Hill*, 1 M. & Sel. 240; *Glaister v. Hewitt*, 8 T. R. 69; but the attorney has no lien on real estate recovered by him for his costs of doing so, *Shaw v. Neale*, 1 Jur. N. S. 664.

(8) *Ormerod v. Tate*, 1 East, 464; *Holcroft v. Manly*, 8 Sc. N. R. 473; *Lloyd v. Mansell*, 22 L. J. 110, Q. B.

(9) *Ibid.*; *Barker v. St. Quintin*, 12 M. & W. 441.

(10) *Read v. Dupper*, 6 T. R. 361; *Gould v. Davies*, 1 Dowl. 288.

(11) *Swaine v. Senate*, 2 N. R. 49; *Jordan v. Hunt*, 3 Dowl. 666; *Gould v. Davies*, 1 Dowl. 288; *Barber v. Harris*, 7 Dowl. 589.

(12) *Clark v. Smith*, 6 M. & Gr. 1051; 1 D. & L. 960; *Quested v. Callis*, 10 M. & W. 18; 1 Dowl. N. S. 888; *Re Oliver*, 1 Har. & W. 79. See, where the lien was held invalid on a sum being paid, and a juror being withdrawn, *Stretton v. London and South Western Railway Company*, 16 C. B. 40.

(13) *Francis v. Webb*, 7 C. B. 731; *Wright v. Burrough*, 3 C. B. 344; *Jones v. Bonnet*, 2 Exch. 230.

(14) *Ex parte Hart*, 1 B. & Ad. 660; *Quested v. Callis*, 1 Dowl. N. S. 888.

judgment from declining to issue execution,⁽¹⁾ or from entering satisfaction on the roll,⁽²⁾ or from discharging the opposite party from custody,⁽³⁾ or from entering a *stet processus*;⁽⁴⁾ nor, in general, will the attorney's lien stand in the way of the defendant's discharge by reason of the plaintiff's death.⁽⁵⁾ No set off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs, in the particular suit against which the set off is sought, provided nevertheless that interlocutory costs in the same suit awarded to the adverse party may be deducted.⁽⁶⁾

(a) *Delivering up papers.*—The court or a judge may compel the attorney to deliver up to the client all papers, deeds &c., on payment of his costs,⁽⁷⁾ (but not unless the costs are paid or the lien satisfied,)⁽⁸⁾ in those cases where the court has power to order taxation of such costs.⁽⁹⁾ Thus an attorney, employed by an administrator to get in and pay debts of the deceased, has been ordered to deliver a bill of costs, and pay over the balance;⁽¹⁰⁾ so where employed to prepare a mortgage, and raise money to pay off debts.⁽¹¹⁾ But the court have refused where the attorney held the papers only as trustee,⁽¹²⁾ or receiver of an estate,⁽¹³⁾ or lender of money on the security of bills,⁽¹⁴⁾ or was specially entrusted with a sum to pay legacies,⁽¹⁵⁾ or to pay a proctor for proving a will,⁽¹⁶⁾ or had insured his client's life and obtained payment of the

(1) *Barker v. St. Quintin*, 1 D. & L. 542; 12 M. & W. 441.

(2) *Abbott v. Rice*, 10 Moore, 489; 3 Bing. 132.

(3) *Mare v. Smith*, 4 B. & Ald. 466.

(4) *Quested v. Callis*, 1 Dowl. N. S. 888; 10 M. & W. 18.

(5) See *ante*, p. 730.

(6) Rule Pr. 63, H. T. 1853; see *ante*, p. 504.

(7) 6 & 7. Vict. c. 73, s. 37, *ante*, p. 1250.

(8) *Goring v. Bishop*, 1 Salk. 621; *Ex parte Lowe*, 8 East, 237; *Re Broomhead*, 5 D. & L. 2.

(9) See *ante*, p. 1250; *Ex parte Horsfall*, 7 B. & C. 528; *Ex parte Holdsworth*, 4 Bing. N. C. 386.

(10) *Re Aitken*, 4 B. & Ald. 47; *Re Cardross*, 7 Dowl. 861; *Stephens v. Hill*, 10 M. & W. 32; *Re Webb*, 14 L. J. 144, Q. B.

(11) *Ex parte Cripwell*, 5 Dowl. 689.

(12) *Pearson v. Sutton*, 3 Taunt. 364; *Duncan v. Richmond*, 7 Taunt. 391. See *Ex parte Morris*, 27 L. T. 111, where the papers were left for a night for safe custody.

(13) *Cocks v. Harman*, 6 East, 404.

(14) *Ex parte Schwalbanker*, 1 Dowl. 182.

(15) *Re Webb*, 2 D. & L. 932.

(16) *Ex parte Cowie*, 3 Dowl. 600.

the policy.⁽¹⁾ So it has been refused, where the papers came into the attorney's hands when he was an articulated clerk;⁽²⁾ where the client had disputed the retainer, and succeeded in proving there was none;⁽³⁾ where the attorney had merely served the writ and declaration as the country agent.⁽⁴⁾ So the court refused to compel an attorney to deliver up letters written to him by his client, the object being to support an action against the attorney for negligence.⁽⁵⁾ So the court will not compel delivery when the attorney *bonâ fide* claims a lien, but the client disputes it,⁽⁶⁾ nor where the attorney has been ordered by the Court of Chancery to produce them there;⁽⁷⁾ nor will the court compel the attorney to pay over money of his client after he has become a certificated bankrupt, and the debt was proveable; but it is otherwise if the application was made before the proceedings in bankruptcy commenced.⁽⁸⁾

The application must be made by the client, or some one claiming through him.⁽⁹⁾ Thus, a partner of the attorney cannot get papers of their client thus delivered up to him.⁽¹⁰⁾ Nor can the stamp-office get legacy duty, due by a legatee, from his attorney;⁽¹¹⁾ nor can a third party who has recovered in ejectment get the title deeds from the defendant's attorney.⁽¹²⁾ One alone of several persons, such as trustees, who deposited papers with the attorney, cannot compel delivery.⁽¹³⁾ If the client had dealt solely with one partner of a firm of attorneys and recognised no other, it seems the application can only be made against such partner, but otherwise if he dealt with one merely because it is

(1) *Re Lord Cardross*, 5 M. & W. 545; 7 Dowl. 861.

(2) *Ex parte Deane*, 2 Dowl. 582.

(3) *Ex parte Maxwell*, 4 Dowl. 87.

(4) *Cole v. Grove*, 1 Sc. N. R. 30.

(5) *Lewis v. Briggs*, 2 Hodg. 4.

(6) *Ex parte Millard*, 1 Dowl. 140; *Brazier v. Bryant*, 2 Dowl. 600; *Hodson v. Terrall*, 2 Dowl. 264.

(7) *Re Walmsley*, 2 A. & E. 575.

(8) *Re Newberry*, 4 A. & E. 100; 5 N. & M. 419; *Re Bonner*, 4 B. & Ad. 811; 1 N. & M. 555; see also *R. v. Edwards*, 9 B. & C. 652; *Baron v. Marshall*, 9 D. & R. 390.

(9) *Miers v. Evans*, 3 Jur. 170; *Ex parte Smart*, 1 Har. & W. 626; *Clarke v. Dignam*, 3 M. & W. 478; but see *Cole v. Grove*, 1 Sc. N. R. 30.

(10) *Davidson v. Napier*, 1 Sim. 297.

(11) *Re Fenton*, 3 A. & E. 404; 5 N. & M. 239.

(12) *Re Thornton*, 2 Dowl. 156.

(13) *Re Gregory*, 6 Jur. 282; *Ex parte Moxon*, 1 Dowl. 6; *Duncan v. Richmond*, 7 Taunt. 391.

unnecessary to deal with all.⁽¹⁾ Though there is no limit to the time within which the application must be made, the court may refuse if a long time has elapsed.⁽²⁾ The summons or rule and affidavit are entitled in the matter of the attorney,⁽³⁾ though the matter arises out of an action.⁽⁴⁾ The affidavit should set forth the facts necessary for the information of the court or judge; but it need not, it seems, state he is an attorney of the court.⁽⁵⁾ If the attorney refuse to comply with the order, the remedy will be by an attachment or execution on the rule, as the case may be. If he obey, he is not bound to pay interest on the money;⁽⁶⁾ but he must deliver up the papers in reasonable order,⁽⁷⁾ and cannot charge for an inventory of them.⁽⁸⁾

IV. REMEDIES AGAINST ATTORNEYS.

An attorney is amenable to the ordinary remedies competent against laymen; but he is over and above that also liable to be summarily dealt with by the court in certain cases, and to be punished by being mulcted in costs, or by fine, attachment, or by being struck off the roll. The summary remedy will not however be allowed, if an action or other proceeding in respect of the same subject-matter is pending and has not been stopped.⁽⁹⁾ Nor will the court interfere in this way against whatever an attorney does; but generally confines its control to his conduct in some cause.⁽¹⁰⁾

If the attorney has been convicted of a disreputable indictable offence relating to his profession, he may be struck off the roll;⁽¹¹⁾ thus for larceny;⁽¹²⁾ so if he has admitted the

(1) *Re Lawrence*, 23 L. J. 791, Ch.; *Re Ford*, 8 Dowl. 684.

(2) *Ex parte Sharp*, 5 Dowl. 617; *Ex parte Yeatman*, 4 Dowl. 304.

(3) 6 & 7 Vict. c. 73, s. 43.

(4) *Ex parte Randall*, 17 L. J. 232, Q. B.; *Re Wood*, 6 D. & L. 154.

(5) *Ex parte Hore*, 3 Dowl. 600.

(6) *Fenn v. Wild*, 1 Dowl. 491.

(7) *North Western Railway Company v. Sharp*, 10 Exch. 451.

(8) *Ex parte Willand*, 11 C. B. 544; *Re Cattlin*, 18 Beav. 514; but he may charge for an affidavit made on delivering up, *ibid.*

(9) *Anon.* 6 Jur. 678.

(10) *Ex parte Brown*, 27 L. T. 192; *Anon.* 19 L. J. 219, Ex.

(11) *Stephens v. Hill*, 10 M. & W. 28; 1 Dowl. N. S. 669; *Re King*, 8 Q. B. 129; *Ex parte Brownsac*, Cowp. 829.

(12) *Ex parte Bramall*, Cowp. 829.

offence.⁽¹⁾ But a conviction for a conspiracy, unless very gross,⁽²⁾ or a verdict for a libel,⁽³⁾ are not considered of sufficient turpitude. So if the attorney has grossly misconducted himself in circumstances not importing an indictable offence, but nearly affecting his professional character, or in the course of his business as an attorney, he may be punished by being struck off the roll;⁽⁴⁾ as where he sends a threatening letter to extort money,⁽⁵⁾ or keeps out of the way to avoid service of a rule for an attachment,⁽⁶⁾ or refused to answer interrogatories as to his conduct.⁽⁷⁾ Or he will be made at least to pay costs, as where he makes a false affidavit that no bail had been put in;⁽⁸⁾ where he states facts without any foundation in a case for the opinion of counsel,⁽⁹⁾ gives a false address of his client,⁽¹⁰⁾ or of bail,⁽¹¹⁾ where he procures a signature from a party to a cause by misrepresentations,⁽¹²⁾ or procures a witness for the other side to absent himself,⁽¹³⁾ or acts for both sides and deceiving both.⁽¹⁴⁾ But the court has refused to interfere where the attorney acted as informer, and sued *qui tam* in several actions, offering to compromise, though using no threats,⁽¹⁵⁾ or advised an appropriation of money, which the Insolvent Court pronounced a misappropriation,⁽¹⁶⁾ or officiously conducted a criminal prosecution in order to get the costs.⁽¹⁷⁾ Where an attorney disobeys a rule of court, this is in general not a ground for striking him off the roll.⁽¹⁸⁾

Sometimes also where owing to gross negligence or want of skill the client has suffered, the court instead of leaving the client to his action, or to his defence to an action on

(1) *Re ———*, 8 N. & P. 389.

(2) *Anon.* 1 Dowl. 174. See *Re King*, 8 Q. B. 139.

(3) *Anon.* 2 Dowl. 110; *Re Hawdon*, 9 Dowl. 970.

(4) *Re Aitken*, 4 B. & Ald. 47; *Ex parte Bodenham*, 8 A. & E. 959; *Belcher v. Goodered*, 4 C. B. 472.

(5) *R. v. Southerton*, 6 East, 143.

(6) *Anon.* 1 D. & R. 529; *Re ———*, 10 Jur. 198.

(7) *Re Holmes*, 12 Jur. 657.

(8) *Clarke v. Gorman*, 3 Taunt. 492.

(9) *Re Elsam*, 8 B. & C. 597.

(10) *Neal v. Holden*, 3 Dowl. 493.

(11) *Blundell v. Blundell*, 5 B. & Ald. 533.

(12) *Re Oliver*, 2 A. & E. 629; 4 N. & M. 471.

(13) *Stephens v. Hill*, 10 M. & W. 28; 1 Dowl. N. S. 669.

(14) *Berry v. Jenkins*, 3 Bing. 423.

(15) *Smith v. Gillett*, 3 Dowl. 364; *Re Warren*, 1 Har. & W. 113.

(16) *Smith v. Tower*, 2 Dowl. 673.

(17) *Re Davies*, 1 B. C. C. 207.

(18) *Ex parte Townley*, 3 Dowl. 39; *Ex parte Grant*, *id.* 320; *Guildford v. Sims*, 13 C. B. 370.

the bill, may in a summary way order the attorney to pay the costs or compensate the client. This however is done only in very clear cases established by the affidavit.⁽¹⁾ Thus where the briefs were not delivered, in a cause which was tried in consequence as undefended, the attorney was ordered to pay the costs, as between attorney and client.⁽²⁾ So, where the client was nonsuited for the same reason, an attachment was granted, but was ordered to lie in the office a few days to allow an opportunity for compensation.⁽³⁾ So, where *non pros.* was signed.⁽⁴⁾ So, where the attorney discharged a prisoner on receiving a security, which the attorney knew was worthless.⁽⁵⁾

The application is made, by counsel,⁽⁶⁾ to the court only, where the object is to strike the attorney off the roll, or compel him to answer the matters of an affidavit. The latter application is now seldom favoured,⁽⁷⁾ and the rule has been refused, if framed in the alternative.⁽⁸⁾ The motion is made in the court of which the party is an attorney, at the time of the application,⁽⁹⁾ or in which he practised, if the application is not to strike off the roll.⁽¹⁰⁾ The motion cannot be made on the last day of term.⁽¹¹⁾ It should be made in a reasonable time, except there has been fraud; and three terms after the occurrence of the facts has been held too late.⁽¹²⁾ If the ground for striking off the roll is any defect in the articles or registry, or service or admission, and enrolment, the application must be made within twelve calendar months after the admission.⁽¹³⁾ If the application is to answer the matters of an affidavit, the court will

(1) *Meggs v. Binns*, 2 Bing. N. C. 625; *Barker v. Butler*, 2 W. Bl. 780; *Pitt v. Yalden*, 4 Burr. 2061.

(2) *De Rouffigny v. Peale*, 3 Taunt. 484; *White v. Sandell*, 3 Dowl. 798.

(3) *R. v. Tew*, Say. 50.

(4) *Mordaca v. Solomon*, Say. 172; *Adlington v. Appleton*, 2 Camp. 410; *R. v. Fielding*, 2 Burr. 654.

(5) *R. v. Bennett*, Say. 169.

(6) *Ex parte Pitt*, 5 B. & Ad. 1077; 2 Dowl. 439.

(7) *Belcher v. Goodered*, 4 C. B. 474.

(8) *Burton v. Earl of Chesterfield*, 9 Jur. 373.

(9) *Sharp v. Hawker*, 5 Dowl. 186.

(10) *Cole v. Grove*, 1 Sc. N. R. 30; *Re Patteson*, 1 Dowl. 468; *Downton v. Styles*, 4 Bing. N. C. 122; 5 Sc. 414.

(11) *Re Turner*, 3 Dowl. 557; *Ex parte Anon.* 2 Dowl. 227. In the Exchequer, the motion should be made so that the attorney can show cause in the same term. *Ibid.*; *Anon.*, 1 Exch. 453.

(12) *Garry v. Wilks*, 2 Dowl. 649; *Puget v. Chambers*, 7 Sc. 610.

(13) 6 & 7 Vict. c. 73, s. 29.

refuse it, if the affidavit disclose an indictable offence, for no person can be made to criminate himself.⁽¹⁾ If the complaint consist in disobedience of a rule, the application should be for an attachment,⁽²⁾ but there must first be a rule calling on the attorney specifically to do the act.⁽³⁾ If the application is to make the attorney pay the costs caused by his negligence, it may be made to a judge at chambers.⁽⁴⁾ The affidavit is entitled in the matter of the attorney,⁽⁵⁾ unless the matter arises out of a cause, in which case it may be entitled in the cause though made after judgment.⁽⁶⁾ The rule *nisi* to strike off the roll must be personally served.⁽⁷⁾ If the attorney give no satisfactory explanation, and the matter is doubtful, the court may refer to the Master, with power to receive additional affidavits.⁽⁸⁾ Costs will be given against the attorney if the application is granted, or even though it is refused, if there was reasonable cause for making the application.⁽⁹⁾ When the attorney has been struck off the roll in one court, it is sufficient to support a similar application in another court to produce the rule of the first court, and an affidavit of identity.⁽¹⁰⁾ So, if he be re-admitted in one court, he may, on production of the rule, be readmitted in another court.⁽¹¹⁾ The party may be re-admitted after the lapse of time, if the punishment of temporary disqualification be considered adequate, or his character has been vindicated.⁽¹²⁾ In some cases, however,

(1) *Anon.* 5 B. & Ad. 1088; *Re Knight*, 1 Bing. 142; *Robertson v. Wills*, 1 Dowl. N. S. 772; *Stephens v. Hill*, 10 M. & W. 28; 1 Dowl. N. S. 669.

(2) *Ex parte Tounley*, 3 Dowl. 39; *Ex parte Grant*, *id.* 320.

(3) *Roscoe v. Hardman*, 5 Dowl. 157; 2 Har. & W. 118.

(4) *Ex parte Higgs*, 1 Dowl. 495.

(5) As to the contents of the affidavit see *Re King*, 3 N. & M. 716. It seems it need not state that he is an attorney of the court, *Wilson v. Northop*, 4 Dowl. 441; *Ex parte Lord*, 1 Hodg. 195; *Ex parte Becke*, 1 Har. & W. 417. But it is no answer that he has since ceased to be an attorney, *Simes v. Gibbs*, 6 Dowl. 310.

(6) *Stephens v. Hill*, 10 M. & W. 28; *Simes v. Gibbs*, 6 Dowl. 310.

(7) *Re ———*, 23 L. J. 24, Exch.

(8) *Dicas v. Warne*, 2 Dowl. 812.

(9) *Doe d. Thwaites v. Roe*, 3 D. & R. 226.

(10) *Anon.* 1 Exch. 453; *Re Smith*, 1 B. & B. 522; *Re Whitehead*, 4 M. & Gr. 768.

(11) *Ex parte Yates*, 2 M. & Sc. 618; 9 Bing. 454. In the Exchequer this rule makes itself absolute if no cause be shown, *Re Wright*, 1 Exch. 658.

(12) *Re Barber*, Q. B. 24 Nov. 18 55. See also *Re Barber*, 23 L. J. 874, Ch.

he cannot be readmitted, as where he was struck off the rolls for conniving with an unqualified person.⁽¹⁾

Sometimes, an attorney applies to be struck off the roll at his own request. This is necessary before he can keep terms for the bar.⁽²⁾ The application is made to the court on an affidavit, which need not set forth the reason,⁽³⁾ nor that he has taken out his certificate,⁽⁴⁾ but must state that no complaint is pending against him or is apprehended.⁽⁵⁾ If he should afterwards apply to be readmitted, he must state grounds to the court in an affidavit.⁽⁶⁾

V. AGENTS.

When one attorney acts for another attorney in matters falling within the province of an attorney, the former is called the agent of the latter, though the term is usually confined to the case of a London attorney who carries on a suit for a country attorney. In most respects the London agent is treated as the attorney in the cause, and has a general authority in respect of the particular cause; whereas, when a town attorney employs a country attorney, as, for example, to serve a writ, the authority of the latter is limited to the particular step. It is necessary that a London agent should be employed by the country attorney to conduct an action, for the latter would not be allowed travelling expenses in attending to the business. At the trial of the cause, sometimes both the agent and the attorney who employed him attend, and the expenses of both may be allowed, if the Master, in his discretion, think it was necessary that both should be present.

The agent is treated as the attorney in the cause by the opposite party, for the purpose of serving notices, pleadings, &c., and may be personally answerable for costs in case of misconduct. He looks to the country attorney as his client,

⁽¹⁾ 6 & 7 Vict. c. 73.

⁽²⁾ If, after being at the bar, he wishes to be readmitted, he must first be disbarred, see *Ex parte Cole*, 1 Doug. 114; *Ex parte Warner*, 6 Jur. 1016.

⁽³⁾ *Ex parte Burrell*, 11 Jur. 1062.

⁽⁴⁾ *Ex parte Partridge*, 4 Jur. 681.

⁽⁵⁾ *Anon.* 1 Chitt. R. 557; *id.* 692; *Ex parte Shoobridge*, 27 L. T. 83; *Ex parte Gray*, 9 Dowl. 336. When struck off the roll of one court, see an application in another court on an affidavit by a third party, *Re Sturdy*, 2 Jur. N. S. 452.

⁽⁶⁾ *Ex parte Smith*, 1 Chitt. R. 692.

and not to the original client of the country attorney; and, conversely, the original client treats the country attorney, and not the agent, as his attorney. Hence, it follows, that the attorney is bound by the acts of the agent,⁽¹⁾ but only as regards the particular action,⁽²⁾ while the attorney is bound to the client for the negligence or mistake of the agent, and can alone be sued by the client,⁽³⁾ and merely has a remedy over against the agent for his own protection. There being no privity between the client and the agent, though the client has given money to the attorney to remit to the agent to be applied in a particular way, the client cannot sue the agent for money had and received.⁽⁴⁾ But where the agent had, without authority from the attorney or client, received money from the opposite party for his client, the latter has, on application, compelled the agent to pay it over to him.⁽⁵⁾

The agent has a lien on the papers and moneys coming into his hand in the course of the action for his general balance, as against the attorney;⁽⁶⁾ but as against the client only for the amount of his agency bill in that particular action.⁽⁷⁾ Hence, the agent's lien, as against the client, is irrespective of the state of the account between the attorney and client.⁽⁸⁾ Hence also, if the client has paid the attorney, he can sue the latter for his papers, though the agent detains them for his general balance.⁽⁹⁾ Hence also, as the agent is not the client's attorney, the former cannot prevent a set-off of cross-judgments.⁽¹⁰⁾ And if the client pay the agent, this is no discharge against the attorney.⁽¹¹⁾ The

(1) *Wallace v. Willington*, Barnes, 256; *Griffiths v. Williams*, 1 T. R. 710.

(2) *Yates v. Frecklington*, 2 Doug. 622.

(3) *Ex parte Jones*, 2 Dowl. 161; *id.* 901; *Robbins v. Fennell*, 11 Q. B. 248; *Collins v. Griffin*, Barnes, 37; *id.* 38.

(4) *Cobbe v. Becke*, 6 Q. B. 930.

(5) *Robbins v. Fennell*, 11 Q. B. 248.

(6) *Bray v. Hine*, 6 Price, 203.

(7) *Moody v. Spencer*, 2 D. & R. 6; *White v. Royal Exchange Company*, 1 Bing. 21; 7 Moore, 249; *Taunton v. Goforth*, 9 D. & R. 384; *Robbins v. Heath*, 11 Q. B. 257; *Curtis v. Tabram*, 1 Har. & W. 523.

(8) *Ward v. Heppel*, 15 Ves. 297; *Dicas v. Stockley*, 7 C. & P. 587. See *Moody v. Spencer*, 2 D. & R. 8, as to where the attorney is paid beforehand.

(9) *Anderson v. Pasman*, 7 C. & P. 193.

(10) *Vansandau v. Burt*, 1 D. & R. 168. See *Taunton v. Goforth*, 9 D. & R. 384, where the attorney was himself the plaintiff.

(11) *Yates v. Freckleton*, 2 Doug. 623.

agent's bill may be referred to taxation as in other cases ⁽¹⁾

If the agent is named as the attorney in the record, he cannot be changed without leave, as stated, *ante*, p. 1247. Though the agent can, *primâ facie*, look only to the attorney for his costs, notwithstanding that he knew that the attorney acted for the client, still it is sometimes a question for the jury to whom the credit was given.⁽²⁾

⁽¹⁾ *Smith v. Dimes*, 4 Exch. 32.

⁽²⁾ *Scrace v. Whittington*, 3 D. & R. 195; 2 B. & C. 11; *Robbins v. Fennell*, 11 Q. B. 248.

BOOK II.—CHAPTER XXXV. (1)

ACTION OF MANDAMUS—INJUNCTION—EQUITABLE PLEA.

I. MANDAMUS.

THE clauses of the Common Law Procedure Act, 1854, empowering a plaintiff to claim a *mandamus*, are as follows:—

The plaintiff in any action in any of the superior courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice (2) that the plaintiff intends to claim a writ of *mandamus*, and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or separately, a writ of *mandamus* commanding the defendant to fulfil any duty, in the fulfilment of which the plaintiff is interested. (3)

The declaration (4) in such action shall set forth sufficient grounds upon which such claim is founded, and shall set forth that the plaintiff is personally interested therein, and that he sustains or may sustain damage by the nonperformance of such duty, and that performance thereof has been demanded of him, and refused or neglected. (5)

The pleadings and other proceedings in any action in which a writ of *mandamus* is claimed shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages. (6)

In case judgment shall be given to the plaintiff that a *mandamus* do issue, it shall be lawful for the court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of *mandamus* to the defendant, commanding him forthwith to perform the duty to be enforced. (7)

(1) See note, p. 1040.

(2) See a form, *ante*, p. 93.

(3) C. L. P. Act, 1854, s. 68.

(4) See a form, *ante*, p. 135.

(5) C. L. P. Act, 1854, s. 69.

(6) *Ibid.* s. 70. (7) *Ibid.* s. 71.

Nothing herein contained shall take away the jurisdiction of the Court of Queen's Bench, nor shall any writ of *mandamus* issued out of that court be invalid, by reason of the right of the prosecutor to proceed by action for *mandamus* under this act.⁽¹⁾ Upon application by motion for any writ of *mandamus* in the Court of Queen's Bench, the rule may in all cases be absolute in the first instance if the court shall think fit, and the writ may bear teste on the day of its issuing, and may be made returnable forthwith, whether in term or in vacation, but time may be allowed to return it by the court or judge, either with or without terms.⁽²⁾ The provisions of the Common Law Procedure Acts, 1852 and 1854, shall apply, so far as they are applicable, to the pleadings and proceedings upon a prerogative writ of *mandamus* issued by the Court of Queen's Bench.⁽³⁾

The effect of these sections is not to transfer to the common law courts the powers of a court of equity in regard to specific performance, far less to empower them to order specific performance of all personal contracts; but merely to extend to the other two common law courts part of the former peculiar jurisdiction of the Queen's Bench. The jurisdiction is thus still confined to those cases where there might have been a *mandamus* in the Queen's Bench before the act, and where the interest of the party is of a public nature, or arises under an act of Parliament. In *Benson v. Paull*, the parties had entered into an agreement for a lease of seven years, and one of the parties sought to compel the specific performance of the lease by claiming a writ of *mandamus*, but Lord Campbell, C. J. said:—

I am of opinion that section 68 does not extend to the enforcing of a duty arising out of a personal contract. If so it would extend to all cases in which a contract was to be performed, because in all such cases it is the duty of every person to fulfil his contract. No doubt the bill when in Parliament contained a clause giving to courts of common law the same power as to enforcing of contracts as that exercised by courts of equity, but it was thought that such a power could not be properly worked by the machinery in the courts of common law, and the clause was rejected. It could hardly have been intended by the legislature to give to courts of common law a jurisdiction as respects contracts much more extensive than courts of equity have ever exercised. According to the construction contended for on the part of the plaintiff, the power to grant a *mandamus* would apply to every case where there was a duty arising out of a contract, in the fulfilment of which an individual was personally interested; it would apply to the case of a promise to marry, and, *pari ratione*, we should be bound to grant a *mandamus*, on the application of a lady, to compel her suitor to perform his promise and lead her to the hymeneal altar. Courts of

(¹) C. L. P. Act, 1854, s. 75.

(²) *Ibid.* s. 76.

(³) *Ibid.* s. 77.

equity never interfere in such a case, and even in cases in which equity does interfere, it never could have been the intention to confer a power on the courts of common law which they could not satisfactorily exercise, so as to ensure equity being done between the parties. If we attempted to exercise this jurisdiction within the area occupied by courts of equity, we should be sailing without chart or compass in a sea to which there are no limits. I think the section must be considered as confined to those cases in which before the act passed a *mandamus* would have lain.⁽¹⁾

The *mandamus* can in general only be claimed where there is no other specific legal remedy,⁽²⁾ unless the remedy is obsolete or inconvenient,⁽³⁾ or it is by no means clear whether there is any;⁽⁴⁾ and it is not claimable merely to anticipate a probable defect of duty.⁽⁵⁾ The duty of the party liable must be clear, whether created by statute or otherwise.⁽⁶⁾ The duty must be imperative, leaving him no discretion,⁽⁷⁾ though if the discretion has been exercised with manifest injustice, the court may interfere.⁽⁸⁾ The court will not extend the remedy of *mandamus* to cases not within it, merely because the parties waive the objection.⁽⁹⁾ The duty must be a public duty, but the value to the public is not nicely weighed.⁽¹⁰⁾ The court however will not entertain the claim if the *mandamus* must be fruitless or useless,⁽¹¹⁾ or subject the parties commanded to an action,⁽¹²⁾

(1) *Benson v. Paull*, 27 L. T. 78, Q. B. ; 25 L. J. 274, Q. B.

(2) *R. v. Bishop of Chester*, 1 T. R. 404; *R. v. St. Katherine's Docks*, 4 B. & Ad. 360; *R. v. Windham*, 1 Cowp. 377; *R. v. Hull and Selby Railway Company* 6 Q. B. 70.

(3) *Ibid.*

(4) *R. v. Nottingham Waterworks*, 6 A. & E. 355; *R. v. Rector of Birmingham*, 7 A. & E. 259.

(5) *Blackborough v. Davis*, 1 P. Wms. 48.

(6) *R. v. Greene*, 6 A. & E. 548; *R. v. Eastern Counties Railway Company*, 10 A. & E. 515.

(7) *R. v. South Eastern Railway Company*, 4 H. L. Cas. 471; *R. v. Hughes*, 3 A. & E. 429; *R. v. Mayor of London*, 3 B. & Ad. 254; *R. v. Bishop of Gloucester*, 2 B. & Ad. 158; *R. v. Eye*, 1 B. & C. 85.

(8) *Ex parte Becke*, 3 B. & Ad. 704; *R. v. Lancashire*, JJ. 7 B. & C. 692; *R. v. West Riding*, JJ. 5 B. & Ad. 671.

(9) *R. v. Lords of Treasury*, 16 Q. B. 357.

(10) *R. v. Bank of England*, 2 B. & Ad. 622; *R. v. Eastern Counties Railway Company*, 10 A. & E. 557; *R. v. Barker*, Burr. 1265.

(11) *Ibid.*; *R. v. Bridgman*, 15 L. J. 44; *R. v. Bishop of London*, 1 Wils. 11; 12 East, 420; *R. v. Heathcote*, 10 Mod. 55; *R. v. Northwich Savings Bank*, 9 A. & E. 729.

(12) *R. v. Heathcote*, 10 Mod. 51; *R. v. Dyer*, 2 A. & E. 606; see 6 & 7 Vict. c. 67, s. 3.

or command what is impossible,⁽¹⁾ or what is clearly unnecessary,⁽²⁾ or if the person claiming seeks merely to gratify curiosity, and no definite purpose will be served,⁽³⁾ or if the *mandamus* will cause confusion,⁽⁴⁾ or mere vexation,⁽⁵⁾ or indecorum.⁽⁶⁾ Nor will the court allow a *mandamus* unless it has been preceded by a distinct demand of the specific thing, the performance of which is the object of the *mandamus*, and by a refusal of performance or conduct equivalent thereto.⁽⁷⁾ Moreover the *mandamus* must be claimed within a reasonable time.⁽⁸⁾

Form of writ.]—The writ need not recite the declaration or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordinary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith.⁽⁹⁾

Effect of writ and disobedience.]—The writ of *mandamus*, so issued as aforesaid, shall have the same force and effect as a peremptory writ of *mandamus* issued out of the Court of Queen's Bench, and in case of disobedience may be enforced by attachment.⁽¹⁰⁾ No return thereto except that of compliance shall be allowed, but time to return it may, upon sufficient grounds, be allowed by the court or a judge, either with or without terms.⁽¹¹⁾ The court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct that the act required to be done may be done by the plaintiff, or some other person appointed by the court at the expense of the defendant; and upon the act being done, the amount of such expense may be ascertained by the court, either by writ of inquiry or reference to a Master, as the court or a judge may order, and the court may order payment of the

⁽¹⁾ *R. v. London and North Western Railway Company*, 6 Rail. C. 634.

⁽²⁾ *R. v. Pitt*, 10 A. & E. 372; *Anon. Loft*, 148; *R. v. Llandilo Roads*, 2 T. R. 232.

⁽³⁾ *R. v. Staffordshire*, JJ. 6 A. & E. 90.

⁽⁴⁾ *R. v. Bishop of Ely*, 1 Wils. 266; 1 W. BL 59.

⁽⁵⁾ *R. v. St. John's College*, Comb. 238.

⁽⁶⁾ *R. v. Coleridge*, 1 Chit. R. 597.

⁽⁷⁾ *R. v. Bristol Railway Co.* 4 Q. B. 162; 3 G. & D. 384; *Ex parte Thompson*, 6 Q. B. 721; C. L. P. Act, 1854, s. 70.

⁽⁸⁾ *R. v. Townsend*, 28 L. T. 100, Q. B.

⁽⁹⁾ C. L. P. Act, 1854, s. 72. ⁽¹⁰⁾ *Ibid.* s. 73. ⁽¹¹⁾ *Ibid.* s. 72.

amount of such expenses and costs, and enforce payment thereof by execution.⁽¹⁾

Form of Judgment for Plaintiff after Verdict, that a Mandamus do issue under sect. 71 of the Common Law Procedure Act, 1854.⁽²⁾

*The same as in the ordinary form of an entry of a judgment to the end of the postea, and then thus :—*Therefore it is considered that a writ of mandamus do issue, commanding the defendant to [*here state the duty to be performed, or the thing to be done, as claimed by the declaration*]. And it is also considered that the plaintiff do recover of the defendant the said moneys by the justices [*or by the judge or baron*] aforesaid, in form aforesaid above assessed, and also £ for his costs of suit in this behalf.

In the margin of the judgment opposite the first words, "Therefore it is considered, &c.," write "judgment signed the day of , 18 , [inserting the day of signing final judgment.]

Writ of Inquiry to ascertain the Expense incurred by the doing of an act, and for the doing of which a Mandamus was issued.⁽³⁾

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, defender of the faith: To the sheriff of greeting. Whereas, upon an application by A. B., the plaintiff in an action against C. D., in our Court of Queen's Bench [*or "Common Pleas," or "Exch. of Pleas," as the case may be*], at Westminster, our said court did, on the day of , A.D. , (*date of order*), direct that [*state the terms of the order directing the act to be done at the defendant's expense*]; and the said A. B. [*or, "and E. F.," if another person than the plaintiff has been appointed by the court to do the act*], has done the said act so directed to be done; and, in order to enable our said court to ascertain the amount of the expense of the doing the same, we command you that, by the oath of twelve good and lawful men of your bailiwick, you diligently inquire what is the amount of the expenses incurred by the said A. B. [*or, by E. F., as the case may be*], in the doing of the said act, and that you send to us [*or in C. P. "to our justices," or in Exch. "to the barons of our Exchequer"*], at Westminster, on the day of , now next ensuing, the inquisition which you shall thereupon take under your seal and the seal of those by whose oath you shall take that inquisition, together with this writ. Witness, , (*name of chief justice, or, in Exch. of chief baron*), at Westminster, the day of , in the year of our Lord .

(1) C. L. P. Act, 1854, s. 74.

(2) Rule Pr. M. V. 1854, Sched. 32.

(3) *Ibid.* Sched. 33.

II. ACTION FOR INJUNCTION.

The Common Law Procedure Act, 1854, enabling a plaintiff to claim a writ of injunction, enacts as follows:—

In all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action, he may, in like case and manner as hereinbefore provided, with respect to *mandamus*, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right; and he may also, in the same action, include a claim for damages or other redress.⁽¹⁾

The writ of summons in such action shall be in the same form as the writ of summons in any personal action; but, on every such writ and copy thereof, there shall be indorsed a notice⁽²⁾ that, in default of appearance the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction.⁽³⁾

The proceedings in such action shall be the same, as nearly as may be, and subject to the like control as the proceedings in an action to obtain a *mandamus* under the provisions hereinbefore contained;⁽⁴⁾ and in such action judgment may be given that the writ of injunction do or do not issue, as justice may require, and in case of disobedience such writ of injunction may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge.⁽⁵⁾

It shall be lawful for the plaintiff, at any time after the commencement of the action, and whether before or after judgment, to apply *ex parte* to the court or a judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract, or injury of a like kind, arising out of the same contract, or relating to the same property or right; and such writ may be granted or denied by the court or judge upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such court or judge shall seem reasonable and just, and in case of disobedience such writ may be enforced by attachment by the court, or, when such courts shall not be sitting, by a judge; provided always, that any order for a writ of injunction made by a judge, or any writ issued by virtue thereof, may be discharged or varied, or set aside by the court, on application made thereto by any party dissatisfied with such order.⁽⁶⁾

The effect of these sections is to give the same power to a court of law as to granting an injunction, which courts

(1) C. L. P. Act, 1854, s. 79.

(2) See the form of indorsement, *ante*, p. 94.

(3) C. L. P. Act, 1854, s. 80.

(4) See a form of declaration, *ante*, p. 136.

(5) C. L. P. Act, 1854, s. 81.

(6) *Ibid.* s. 82.

of equity exercise in cases where the injunction is granted without terms; in other words, the court of common law will only grant an injunction where, in the same circumstances, the court of equity would grant an absolute injunction. The reason of this restriction is that the court of common law has no organs to do entire justice between the parties in those cases in which courts of equity impose terms.⁽¹⁾ Where a court of equity, however, sees that the question between the parties can be dealt with, but cannot be wholly decided at law, while a part of the relief sought by the plaintiff can only be obtained in equity, the court of equity will, on a motion for an injunction to restrain an action at law, grant the injunction until the hearing of the cause.⁽²⁾

III. EQUITABLE PLEAS, REPLICATIONS, &c.

The Common Law Procedure Act, 1854, enacts:—

It shall be lawful for the defendant or plaintiff in replevin in any cause in any of the superior courts, in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea; provided that such plea shall begin with the words "for defence on equitable grounds," or words to the like effect.⁽³⁾

Any such matter which, if it arose before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querela*.⁽⁴⁾

The plaintiff may *reply*, in answer to any plea of the defendant, facts which avoid such plea upon equitable grounds; provided that such replication shall begin with the words "for replication on equitable grounds," or words to the like effect.⁽⁵⁾

Provided always, that in case it shall appear to the court, or any judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a court of law so as to do justice between the parties, it shall be lawful for such court or judge to order the same to be *struck out*, on such terms as to costs and otherwise as to such court or judge may seem reasonable.⁽⁶⁾

As to the full effect of these enactments, the Court of

⁽¹⁾ See *Mines Royal Society v. Magnay*, 10 Exch. 489.

⁽²⁾ *Athenæum Life Assurance Company*, 27 L. T. 232, V. C. W.

⁽³⁾ C. L. P. Act, 1854, s. 83.

⁽⁴⁾ *Ibid.* s. 84.

⁽⁵⁾ *Ibid.* s. 85.

⁽⁶⁾ *Ibid.* s. 86.

Queen's Bench, in the considered judgment in *Woodhouse v. Farebrother* (5 E. & B. 277), thus stated the limits within which a court of law will interfere in allowing equitable defences. That was an action on a bond for 4000*l.*, conditioned to indemnify the obligees against the defaults in observance by one C. of the covenants in an indenture referred to in the condition, whereby C. covenanted with the obligees of this bond to repay 2000*l.*, lent him on mortgage of a policy of insurance, to keep the policy up, pay the premiums, and pay the interest on the 2000*l.* Breaches of the condition were assigned, inasmuch as C. had not paid interest, and had not paid premiums, and defendant had not indemnified. Plea, by way of equitable defence, that the defendant was surety for C. only, and that he had offered and was still ready to pay all that was in equity due to the obligees on receiving an assignment of the securities. Lord Campbell, C. J., on delivering judgment, said:—

“It is not for us sitting here judicially to say how far it is desirable or expedient that equitable jurisdiction should be given to courts of common law. We have only, looking to the language of the legislature, to consider that equitable jurisdiction has actually been given to us, bearing in mind that, unless in as far as our power and procedure have been altered by express enactment, or reasonable implication from what has been expressly enacted, they remain unchanged. . . . The very important question therefore arises, whether where a defendant would only be entitled to relief against a judgment, to the extent of a temporary or conditional injunction, he is entitled to set up his equitable grounds of relief, by way of defence in a court of law? We are of opinion that as yet the legislature has authorized us to receive a plea disclosing equitable grounds of relief, only where the facts would entitle the defendant to an absolute and perpetual injunction against the judgment. In this last case no difficulty occurs, for the plea is a simple bar to the action, and we should only have to pronounce the common law judgment, ‘that the plaintiff take nothing by his writ, and that the defendant go thereof without day.’ But if the injunction is to be temporary or conditional in equity, at common law we have no such judgment, and we have no analogous judgment. We could not attempt to do justice between the parties without pronouncing, instead of a common law judgment, an equitable decree. If upon such a plea we were to give judgment in bar of the action, all legal remedy would be gone, although the defendant confesses his liability to pay the sums which this action seeks to recover. It is said that the plaintiffs might afterwards have relief in equity, or might perhaps bring another action when they have transferred the policy to the defendant; but we think that it was intended to admit a plea on equitable grounds, only where final justice may be done by the court of law in the pending suit. This could only be by pronouncing an

equitable decree. But we have no warrant to pronounce such a decree. By section 85, a replication is supposed to follow the equitable plea, and common law procedure is still contemplated. Where the judgment, if obtained, would be substantially reversed by a perpetual injunction in equity, that which would be sufficient ground for the perpetual injunction is admitted as a legal defence, in the same manner as payment after the day, which at common law was only ground for equitable relief after a judgment had been obtained for the penalty of the bond. This was, by the statute of Anne, let in as a legal defence, and as by the recent statute to an action against a surety or an instrument under seal, time given to the principal debtor without the consent of the surety is turned into a legal defence, although previously it was only ground for equitable relief. But where the ground for equitable relief is not a complete bar to any proceedings upon the judgment, and is not, if offered by plea, a complete bar to the action, we are not furnished with any means of doing justice between the parties. We cannot enter into equities and cross equities; we should often be without means to determine what are the fit conditions on which the relief should be given; no power is conferred upon us to pronounce a conditional judgment; no process is provided by which we could enforce performance of the condition; there are no writs of execution against persons or goods adapted to such a judgment, and no one can conjecture what remedy it would give against the lands of the debtor. In short we think that a plea on equitable grounds is to prevail only where, followed by a common law judgment, it will do complete and final justice between the parties. Such appears to have been the view of the Court of Exchequer in *Mines Royal Society v. Magnay* (10 Exch. 489), where leave was refused to plead such a plea, something remaining to be done by the defendant before he could have claimed a perpetual injunction in a court of equity. As that case was decided merely on motion, without the opportunity of carrying it into a court of error, we should not have considered ourselves bound by it, had we disapproved of it; but we entirely concur in the reasoning on which it is founded. And therefore without deeming it necessary to consider the replication or the rejoinder on the insufficiency of the plea, we give judgment for the plaintiffs."

The Court of Common Pleas has also, with a slight qualification, agreed with the other two courts. In *Wood v. Copper Miners Company* (17 C. B. 592), Jervis, C. J. said:—"Without attempting to define the form or the precise circumstances under which a court of law will admit an equitable plea to enure as an answer to an action, it is plain that, inasmuch as a judgment for the defendants here would bar the action, we cannot hold this to be a good equitable plea, unless it discloses a case in which a court of equity would grant a perpetual, unqualified and unconditional injunction. Whether that test is applicable in all cases, it is not necessary now to inquire. No doubt in this

as in all cases, the court will not admit an equitable plea that would carry the legal defence further than a court of equity would extend its protection to a party."

Acting on the principle thus expressed, the courts have allowed an equitable defence in the following cases. To detain for a lease, that it was deposited to secure payment to the defendants of 150*l.* and interest, by way of equitable mortgage upon the terms of an agreement in writing, the former recovery and proceedings thereon, that the 150*l.* was still due, and that after the commencement of this action the defendant tendered and offered to deliver up the lease on payment of the 150*l.* with costs of the action up to that time, which offer was refused.⁽¹⁾ In an action on a policy of assurance, the defendant pleaded that the policy was made on the terms of a previous proposal being true, and that a statement therein was untrue; and an equitable replication was held good, that before the policy was made the defendants issued a prospectus, stating that all policies effected by them should be indisputable, except in cases of fraud. on the faith of which representation the plaintiff effected the policy.⁽²⁾ In trover for goods, an equitable defence was allowed, that the plaintiff was owner of premises, and the goods were the stock in trade thereon, which were purchased by the defendants, but owing to a mistake of the broker in drawing up the bought and sold notes, the goods in question were omitted, and that possession of the goods and premises had been delivered to the defendants and the purchase completed.⁽³⁾ In an action on a covenant binding the defendant not to practise in S., the court allowed an equitable plea, that, as between the defendant and the plaintiff, the part of S. in which the defendant practised, had always been treated as being in S. M., and that it was not intended by the parties to restrain the defendant from practising in the part of S. in question, and that the covenant, as set forth in the declaration, was so framed by mistake.⁽⁴⁾

The courts have refused to allow an equitable plea in the following cases: where the plea disclosed circumstances in

(1) *Chilton v. Carrington*, 16 C. B. 206.

(2) *Wood v. Dwarries*, 11 Exch. 493; in this case it was also held, that when, in an action on a written contract, a defendant pleads matter which he is in equity precluded from setting up by a term of the contract not stated in the written instrument, a court of law may give equitable relief without the instrument being first reformed.

(3) *Steele v. Haddock*, 10 Exch. 952.

(4) *Luce v. Izod*, 1 H. & N. 245.

which a court of equity would only restrain the action on terms and conditions, the plea amounting merely to a pending arbitration.⁽¹⁾ In an action of account upon the statute 4 Anne, c. 16, s. 27, by one tenant in common against another, for not accounting for rents received, the defendant pleaded that, before the receipt of the rents, the plaintiff and defendant by indenture demised the premises to W. for a term of 500 years, which term, after divers assignments, vested in the defendants; and an equitable replication that the said indenture was a mortgage to secure a sum of money, and that defendant had received more than sufficient to pay the mortgage debt, was struck out, because the court could not order a reconveyance.⁽²⁾ In an action against an executor for goods sold, &c., to the testator, the defendant pleaded the Statute of Limitations; and an equitable replication, that the testator bequeathed his property in trust to pay his creditors, was held bad.⁽³⁾ So, in the same case, to a plea of set-off of money due to plaintiff for use and occupation by the testator, an equitable replication, that the testator by his will directed all sums of money and effects already advanced to the plaintiff (of which the sum set off was one) should be deemed an advancement, was held bad.⁽⁴⁾ In an action for the nonperformance of an alleged agreement to load a ship for a particular voyage, with a guaranteed freight of not less than 5500*l.*, the court refused to allow an equitable plea, that the real contract was, that the ship should earn freight at such a rate per ton, that if filled she would obtain 5500*l.*, and that, by mistake of the person who reduced the contract into writing in the Spanish language, which he imperfectly understood, it was described as an absolute guarantee that the ship should have a freight of 5500*l.*⁽⁵⁾ In an action of covenant for rent, an equitable plea was refused, that the defendant agreed with the plaintiff that the defendant's tenants should attorn to the plaintiff, and that the defendant should pay a sum in satisfaction of the covenants, and the lease should be cancelled, and that the defendant had paid the sum accordingly and done every

(1) *Wood v. Copper Miners Company*, 17 C. B. 561.

(2) *Gorely v. Gorely*, 1 H. & N. 144.

(3) *Gulliver v. Gulliver*, 1 H. & N. 174.

(4) *Ibid.*

(5) *Perez v. Olenqa*, 11 Exch. 506, such a plea disclosing ground for a court of equity reforming the contract. See *Wood v. Duwarris*, *ante*, p. 1280. See also *Burgoyne v. Cotterill*, 24 L. J. 28, B. C.; *Vorley v. Barrett*, 26 L. T. 86, C. P.

thing on his part, but the plaintiff had refused to perform his agreement. ⁽¹⁾ Where a husband sued for money had and received, and the defendant's equitable plea was, in substance, that the money was assigned by the wife to him as trustee for her separate use; it was held that the equitable replication was good which set forth a prior assignment to the plaintiff, and that the defendant could not object that the plaintiff's title was a mere equitable title. ⁽²⁾ In an action by a wife's trustee against a banker for dividends, which the latter had paid over to a third party, pursuant to the plaintiff's power of attorney, it was held, the defendant could not be allowed an equitable plea, that the wife had obtained prepayment of her dividends by means of the power of attorney, which she had revoked before the defendant received the dividends. ⁽³⁾

A plaintiff will not be allowed to reply equitably to a plea of the Statute of Limitations in an action for breaking the plaintiff's close and converting his goods, that the cause of action was fraudulently concealed from the plaintiff until within six years before the action. ⁽⁴⁾

The court has ordered the plea to be struck out as follows:—Where, to an action by a drawer against an acceptor of a bill of exchange, the plea on equitable grounds was, that the bill was of a later date than it purported, and was so represented by the plaintiff, and that the action was commenced before the bill would have been due if properly dated. ⁽⁵⁾ Where an action was brought on a joint and several promissory note of the defendant and one S., payable to the plaintiff at six months, and the defendant pleaded equitably that he made the note without consideration and as surety for S. to secure a debt due to the plaintiffs, who took the note from him as such surety, and that the plaintiffs afterwards, without the defendant's consent, and for a good consideration, gave time to S., and had funds to his credit which they did not apply in payment, this was held not to amount to any equitable defence. ⁽⁶⁾

The defendant, after pleading an equitable defence, which has been demurred to, may file a bill in equity for an

⁽¹⁾ *Mines Royal Society v. Magnay*, 10 Exch. 489, *ante*, p. 184. See also *Teed v. Johnson*, 25 L. J. 110, Exch.

⁽²⁾ *Sloper v. Cotterill*, 27 L. J. 199, Q. B.

⁽³⁾ *Clarke v. Latorie*, 19 Nov. 56 Exch.

⁽⁴⁾ *Hunter v. Gibbons*, 24th Nov. 1856, Exch.

⁽⁵⁾ *Drain v. Harvey*, 17 C. B. 257.

⁽⁶⁾ *Strong v. Foster*, 17 C. B. 201.

injunction ;⁽¹⁾ and it seems the court of equity will not stay its hand merely because the demurrer is not disposed of.⁽²⁾

Although an equitable plea has been allowed by a judge at chambers, the plaintiff has a right to come to the court for a rule to strike it out, and this not by way of appeal from the decision of the judge at chambers, but as a substantive motion.⁽³⁾

On allowing an equitable plea, the court, thinking a jury would not dispose of it satisfactorily, has given the plaintiff the option of having the issue tried by the court.⁽⁴⁾

Where a party sues on a contract which was drawn up by mistake, and a court of equity would reform the contract on that ground, it seems a court of law will allow the equitable plea without forcing the defendant first to go into a court of equity, especially if the agreement is executed.⁽⁵⁾

⁽¹⁾ *Phelps v. Protheroe*, 25 L. J. 105, Ch.

⁽²⁾ *Evans v. Bremridge*, 27 L. T. 8, Ch.

⁽³⁾ *Wood v. Copper Miners Company*, 26 L. T. 91, C. P.

⁽⁴⁾ *Luce v. Izod*, 1 H. & N. 245.

⁽⁵⁾ *Volley v. Barrett*, 28 L. T. 86, C. P.

A TABLE OF FEES

To be taken by the Sheriffs, Under Sheriffs, Deputy Sheriffs, Sheriffs' Agents, Bailiffs, and others, the Officers or Ministers of Sheriffs in England and Wales, pursuant to the Statute of 1 Vict. c. 55.

For every warrant which shall be granted by the Sheriff to his officers, upon any writ or process. (See post, p. 1288, as to the charge where there are several defendants.)

	£	s.	d.
In London and Middlesex	0	2	6
And on Crown and outlawry process, an additional ...	0	2	6
In all other counties, where the most distant part of the county shall not exceed 100 miles from London ...	0	5	0
Not exceeding 200 miles	0	6	0
Exceeding 200 miles	0	7	0
For an arrest in London	0	10	6
In Middlesex, not exceeding a mile from the General Post Office	0	10	6
Not exceeding seven miles from same place	1	1	0
In other counties, not exceeding a mile from officer's residence	0	10	6
Not exceeding seven miles... ..	1	1	0
Exceeding seven miles	1	11	6
For conveying the defendant to gaol from the place of arrest, per mile	0	1	0
For an undertaking to give a bail-bond	0	10	6

For a Bail-bond—Deposit in lieu of Bail.

If the debt shall not exceed £ 50	0	10	6
Ditto 100	1	1	0
Ditto 150	1	11	6
Ditto 300	2	2	0
Ditto 400	3	3	0
Ditto 500	4	4	0
If it shall exceed 500	5	5	0

TABLE OF SHERIFF'S FEES.

1285

	£	s.	d.
For receiving money under the statute upon deposit for arrest, and paying the same into court, if in London or Middlesex	0	6	8
If in any other county	0	10	0

For Filing the Bail-bond.

If the arrest be made in London or Middlesex	0	2	0
If in any other county	0	4	0

Assignment of Bail or other Bond.

If in London or Middlesex	0	5	0
If in any other county, including postage	0	7	6
For the return to any writ of <i>habeas corpus</i> , if one action	0	12	0
And for each action after the first... ..	0	2	6
For the bailiff to conduct prisoner to gaol, per diem ...	0	10	0
And travelling expenses, per mile	0	1	0
For searching offices for detainers	0	1	0
Bailiff's messenger for that purpose	0	2	6

Bailiffs executing Warrants, &c.

To the Bailiffs, for executing warrants on extent, <i>capias utlagatum</i> , <i>levari facias</i> , <i>fieri facias</i> , <i>ca. sa.</i> , <i>ne exeat</i> , attachment, <i>elegit</i> , writ of possession, forfeited recognizance, process from Pipe-office, and other like matters, for each, if the distance from the sheriff's office or the bailiff's residence do not exceed five miles				1	1	0
If beyond that distance, per mile				0	0	6
On <i>distringas</i> in London				0	5	0
In Middlesex, not exceeding five miles from General Post Office				0	5	0
Exceeding five miles				0	10	0
In other counties, not exceeding five miles from officer's residence				0	5	0
Exceeding five miles				0	10	0
For each man left in possession, when absolutely necessary, if boarded, per diem				0	3	6
If not boarded, per diem				0	5	0
For every sale by auction, notwithstanding the defendant should become bankrupt or insolvent, where the property sold does not produce more than 300 <i>l.</i> 5 per cent., 480 <i>l.</i> 4 per cent., 500 <i>l.</i> 3 per cent., and where it exceeds 500 <i>l.</i> 2½ per cent.						
For the certificate of sale to save auction duty				0	2	6
Bond of indemnity, besides stamps				1	10	0
Certificate of execution having issued for record				0	5	0

On Writs of Trial and Inquiry.

	£	s.	d.
For a deputation	1	1	0
On lodging writ for entering cause and warrant for summoning jury, which fee shall be forfeited in case of countermand of trial	0	4	0

On Trial or Inquisition.

Sheriff, for presiding	1	1	0
Bailiff, for summoning jury, and attendance in court ...	0	4	0
And if held at the office of the under-sheriff:—			
For hire of room, if actually paid, not exceeding ...	0	10	0
For travelling expenses of under-sheriff from his office to place where trial or inquisition held, per mile ...	0	1	0
To bailiff, from his residence, per mile	0	0	6
In all cases in which it shall appear to the Master that a saving of expense has accrued to the parties by reason of a writ of trial having been executed by deputation, the fee for such deputation shall be allowed.			

On Writs of Extent, Elegit, Capias Utlagatum, and others of the like nature.

For summoning the jury, use of room, presiding at the inquisition, &c....	2	2	0
Jury	0	12	0
For travelling expenses of under-sheriff, from his office to place of inquisition, per mile	0	1	0
For drawing and engrossing the inquisition, per folio ...	0	1	6
For a summons for the attendance of a witness	0	5	0

In Replevin.

Precept to bailiff	0	2	6
Notice for service on defendant	0	2	6
Broker, where the sum demanded and due shall exceed 20 <i>l.</i> and shall not exceed 50 <i>l.</i> , for appraisement and affidavit of value	0	10	6
Where it shall exceed 50 <i>l.</i>	1	1	0
And his travelling expenses from his residence to the place where the goods are, per mile	0	0	6
Bailiff for summoning parties and delivering goods to tenant	1	1	0
And his travelling expenses, same as broker.			
For the warrant, record, and return of a <i>re. fa. lo., accedas ad curiam, pone</i> , or writ of false judgment	0	16	6
For writ <i>retorno habendo</i>	0	4	4

*In Scire Facias, Service of Capias, Outlawry, Error,
Supersedeas, &c.*

Return of Writs.

	£	s.	d.
For each summons on a writ of <i>sci. fa.</i> , or for the service of writ of <i>capias</i> where no arrest	0	5	0
And mileage, per mile	0	1	0
For recording each demand or proclamation under writs of outlawry	0	2	0
For bailiff for making each demand or proclamation on writs of outlawry in London and Middlesex	0	2	6
In other counties	0	5	0
And travelling expenses, if the distance shall exceed five miles, then for every mile beyond that distance ...	0	0	6
For any <i>supersedeas</i> , writ of error, order <i>liberati</i> , or discharge to any writ or process, or for the release of any defendant in custody (unless in the prison of the county), or of goods taken in execution	0	4	6
For the return of any writ or process, and filing the same, exclusive of the fee paid on filing	0	1	0

Jury Process.—Sheriff's attendance in Court, &c.

For return to common venire	0	3	6
The like to special	0	5	0
The like on <i>distringas</i> or <i>habeas corpus</i> for common jury ...	0	12	0
The like for special jury	0	14	0
The like with a view	1	0	0
The like to traverse venire	0	14	6
For attendance naming special jury	2	2	0
Twenty-four warrants to summon special jury	1	4	0
For bailiff for summoning each special juror	0	2	0
Sheriff attending in court ⁽¹⁾	1	1	0
For attending a view, the fees as allowed by Rule of Court, 49 H. T. 1853, <i>ante</i> , p. 247.			

For any Duty not herein provided for, such sum as one of the Masters of the Court of Queen's Bench or Exchequer, or one of the Prothonotaries of the Court of Common Pleas, may, upon special application, allow.

Bond in Replevin.

Instead of the allowance of the fees upon the same scale as the bail bond, the fee of one pound one shilling only is allowed, whatever be the amount, if above 20 <i>l.</i> ...	1	1	0
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⁽¹⁾ This and the three preceding items can no longer be charged for, being swept away by the C. L. P. Act, 1852, s. 108: (*Bennet v. Thompson*, 27 L. T. 202, Q. B.)

Fees on Writs of Trial and Inquisition.

The travelling expenses of the under-sheriff from his office, and of the bailiff from his residence to the place where the trial or inquisition is held, are to be apportioned rateably to the parties, if more than one trial or inquisition be held at the same time and place.

Where there are several defendants in a writ of *capias*, and warrants are issued thereon by the under-sheriff, against more than one defendant, no more shall be charged in any case for each warrant, after the first, than two shillings and sixpence.

[Signed by the Judges.]

ADDENDA ET CORRIGENDA.

Page 12, after fifth line, add—So, the Attorney-General may remove a plaint from the County Courts involving matter of revenue (*Mountjoy v. Wood*, 1 H. & N. 58.)

Page 20, to end of third paragraph, add — The sitting of a judge in the Bail Court, except on the last two days of term, is now discontinued : (Per Lord Campbell, C. J., Nov. 1856.)

Page 29—See *post*, p. 419.

Page 38—See below at p. 165, n. (3).

Page 57, add—*Limitation of actions for merchants' accounts*]—By the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 9, “all actions of account, or for not accounting, and suits for such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen, then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit, by reason only of some other matter of claim comprised in the same account, having arisen within six years next before the commencement of such action or suit.”

Absence beyond seas, or imprisonment of a creditor, not to be a disability.]—“No person or persons who shall be entitled to any action or suit, with respect to which the period of limitation, within which the same shall be brought, is fixed by the 21 Jac. 1, c. 16, s. 3, or by 4 Anne, c. 16, s. 17, or by 53 Geo. 3, c. 127, s. 5, or by 3 & 4 Will. 4, c. 27, ss. 40, 41, 42, and c. 42, s. 3, or by 16 & 17 Vict. c. 113, s. 20 (Irish C. L. P. Act), shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons being, at the time of such cause of action or suit accrued, beyond the seas, or in the cases in which, by virtue of any of the aforesaid enactments, imprisonment is now a

disability, by reason of such person, or some one or more of such persons, being imprisoned at the time of such cause of action or suit accrued." (s. 10.)

Period of limitation to run as to joint debtors in the kingdom.]—
 "Where such cause of action or suit, with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were, at the time such cause of action accrued, beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor, or joint debtors, who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid." (s. 11.)

Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this act.]—
 "No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of Her Majesty, shall be deemed to be beyond seas within the meaning of the act 4 & 5 Anne, c. 16, or of this act." (s. 12.)

Provisions of Lord Tenterden's Act extended to acknowledgments by agents.]—
 "In reference to the provisions of the acts 9 Geo. 4, c. 14, ss. 1, 8, and 16 & 17 Vict. c. 113, ss. 24, 27, an acknowledgment or promise made or contained by or in a writing, signed by an agent of the party chargeable, thereby duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself." (s. 13.)

Part payment by one contractor, &c., not to prevent bar by certain Statutes of Limitations in favour of another contractor, &c.]—
 "In reference to the provisions of 21 Jac. 1, c. 16, s. 3, and of 3 & 4 Will. 4, c. 42, s. 3, and of 16 & 17 Vict. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors or administrators. (s. 14.)

Page 87—Indorsement on the summons of plaintiff's place of business, where he is an attorney suing in person, is sufficient, though he does not sleep at such place : (*Ablett v. Basham*, 5 E. & B. 1019.)

Page 101, n. (3), add—*Cole v. Sherrard*, 11 Exch. 482.

Page 103, to n. (4), add—Where a writ was issued for service within the jurisdiction, and an order had been obtained for liberty to proceed, the defendant, on an affidavit that he was residing abroad, was held right in applying to set aside the order and not the writ itself : (*Hesketh v. Fleming*, 24 L. J. 255, Q. B.)

Page 103, n. (4), add—Thus, where a writ, framed for a British subject residing out of the jurisdiction, was issued and renewed from time to time, and at length served on the defendant in this country, the plaintiff not knowing that the defendant's attorney had previously entered an appearance, the court refused to set the proceeding aside : (*Green v. Braddyll*, 1 H. & N. 69.)

Page 107, after Form of Affidavit, add—Where the defendant was duly served, and did not appear, the judge has made an order to this effect: That the plaintiff should be at liberty to proceed in the action by filing a declaration against the defendant, requiring him to plead thereto in eight days, and by sticking up a notice of such declaration in the Master's office; and that, in default of the defendant pleading within the said eight days, it be referred to one of the Masters to examine into and see that the plaintiff's case is proved, by affidavit or otherwise, as the Master shall think fit, and that the plaintiff shall be at liberty to sign final judgment for the amount found due by the Master : (*Firmin v. Perry*, 27 L. T. 72, Q.B.)

The application by the defendant to set aside the proceedings, on the ground that the cause of action did not arise within the jurisdiction, must be made within a reasonable time: (*Hutton v. Whitehouse*, 1 H. & N. 32.)

Page 116, to first paragraph, add — The affidavit used may be merely the ordinary affidavit of merits, without stating the defence in detail; but it seems doubtful, whether an affidavit in answer to such affidavit ought to be allowed : (*Warrington v. Leake*, 11 Exch. 304.)

Page 123, n. (3), add—Yet, if the plaintiff is stayed merely by an order to find security for costs, the period does not count; but if security is found within the year, then the plaintiff must declare also within the year: (*Ross v. Green*, 10 Exch. 891.)

Page 125, *et seq.*—*Service of notices, pleadings, &c., on Saturdays.*]
—“Service of pleadings, notices, summonses, orders, rules, and other proceedings, shall be made before seven o'clock p. m., except on Saturdays, when it shall be made before two o'clock, p. m. If made after seven o'clock, p. m., on any day except Saturday, the service shall be deemed as made on the following day, and if made after two o'clock p. m., on Saturday, the service shall be deemed as made on the following Monday:” (Rule Pr. E. T. 1856.)

Page 146, to end of second paragraph, add—In actions by patentees defendant is entitled to such particulars as will describe those portions of the machines to which plaintiff contends that his invention has been applied, so as to enable the defendant to understand as far as possible, the nature of the machines as to which he is to be charged.

and it is no answer to the application for such particulars, that defendant's answer to interrogatories is insufficient to enable plaintiff to furnish the particulars, for if those answers were insufficient they should have been objected to. The plaintiff was allowed to inspect the machines on the premises of the defendant, and also to examine him *visé voce*: (*Jones v Lea*, 25 L. J. 241, Exch.)

Page 151, n. (4)—but see *Morgan v. Tarts*, 11 Exch. 82, as to a reference before declaration, and no power reserved to the arbitrator to amend.

Page 151, n. (6), add—Also after judgment: (*Cannon v. Reynolds*, 1 Jur. N. S. 873, Q. B.)

Page 151, n. (7), add—But in ordering better particulars the court will not order to be included, payments made by the defendant: (*Fusell v. Gordon*, 13 C. B. 847.)

Pages 151, 156, 291, 298—*Interrogatories*.]—Interrogatories, the answers to which may be reasonably expected to procure a discovery of what will advance the interrogating party's case, are legitimate, and it is not so objection that the answers may be expected at the same time to disclose the interrogated party's case. *Aliter*, if the answers may reasonably be expected to relate exclusively to the case of the interrogated party: (*Whately v. Croxter*, 5 E. & B. 709.)

Where the plaintiff, immediately after the defendant appeared, but before declaring, applied for leave to administer interrogatories, it was held that more was necessary to be stated in the affidavit than merely that there was a good cause of action, and the discovery would be material. The nature of the case must be set forth so that the judge might consider of the propriety of the interrogatories: (*Crookes v. Morrison*, 5 E. & B. 984.)

Where a party refuses to answer interrogatories, a rule for an attachment will not be made absolute without personal service: (*Russell v. Dodd*, 30th Jan. 1857, B. C.)

Page 157, to fourth line from the bottom, add—After plea, the court will allow the plaintiff to deliver interrogatories without a special affidavit: (*James v. Barnes*, 17 C. B. 596.)

Page 158, after the Form of Answer, add—"The answer must not be general, but should assign reasons for refusing to answer each interrogatory specifically: (*Chester v. Wortley*, 18 C. B. 299.)

Page 161, n. (1), add—See also *Chester v. Wortley*, 17 C. B. 410.

Page 163, to end of first paragraph, add—Interrogatories may be administered in ejectment as in other causes: (*Chester v. Wortley*, 17 B. 410; *Flitcroft v. Fletcher*, 11 Exch. 548;) and the plaintiff may be interrogated as to the character in which he sues and the pedigree on which he relies. (*Ibid.*)

Page 165, n. (3), add—Since the rule of court, requiring pleadings to be delivered before two o'clock on Saturdays, if the declaration was served on the 1st August, and the 9th August was Saturday, a

plea delivered after two o'clock p. m. of that day is a nullity, and judgment may be signed on the Monday: (*Sharp v. Fox*, 1 H. & N. 496.)

Page 176, n. (2), add—*Weld v. Baxter*, 11 Exch. 816.

Page 177, to form of plea 12, add (note)—The plaintiff may, under the general form of replication joining issue on this plea, and without replying excess, show, that although he struck the first blow, the defendant was guilty of excess: (*Dean v. Taylor*, 11 Exch. 68.)

Page 177, to form of plea, add (note)—No plea of judgment is necessary when the contract was for ready money, and the money was paid: (*Wood v. Bletcher*, 27 L. T. 126, Exch.)

Page 190, n. (2), add—So, in an action of libel, a plea setting out facts to show that the alleged libel was a fair comment, will not be allowed to be pleaded, together with a plea of not guilty: (*Earl of Lucan v. Smith*, 1 H. & N. 481.)

Page 198, to end of paragraph, add—If the rule to strike out an embarrassing plea is made absolute, the party obtaining it gets the costs as costs in the cause, but if the rule is varied, the costs are not given to him unless expressly so directed: (*Barnes v. Hayward*, 1 H. & N. 242.)

Page 203, n. (1), add—So, a special replication may be allowed, together with a general traverse of the plea, though it does not raise a distinct defence, where the special replication enables the parties to raise by demurrer the substantial question to be decided in the cause: (*Williams v. African Steam Navigation Company*, 1 H. & N. 19.)

Page 216, n. (3), add—(But see *Fenn v. Green*, 27 L. T. 170, Q. B.)

Page 237, n. (8), add—See as to mode of rebutting this presumption, *Crowther v. Solomons*, 6 C. B. 758.

Page 256, n. (2), add—This rule extends to the costs of a *habeas corpus*, to bring up a prisoner as a witness to give evidence in two causes: (*Griffin v. Hoskyns*, 1 H. & N. 95.)

Page 257, to n. (7), add—But if the witness, after receiving his conduct money, and having done nothing in reference to his attendance, etc notice not to attend, he cannot retain the money, but may be sued by the party for the same, as money had and received: (*Martin v. Andrews*, 22nd Nov. 1856, Q. B.)

Page 259, n. (12), add—Where a deed is executed under a power of attorney the party so executing should be served with a *subpoena duces tecum*, otherwise secondary evidence cannot be given: (*Hibberd v. Knight*, 1 Exch. 11.)

Page 260, n. (7), add—*Netherwood v. Wilkinson*, 17 C. B. 226.

Page 262, n. (12).—Nor does the protection extend to the service

of a writ of summons even in the Nisi Prius Court: (*Poole v. Gould*, 1 H. & N. 99.)

Page 265, after ss. 1 and 2 of 17 & 18 Vict. c. 34, add—The rule is absolute in the first instance: (*Readman v. Broers*, 1 Jur. N. S. 1052; *Harris v. Barber*, 25 L. J. 98, Q. B.) It seems unnecessary, on the application, to show that the witness to be subpoenaed will be called as a witness, if it is reasonable that he should attend: (*Ibid*)

Page 272.—Witnesses necessary for the purposes of foreign suits, who reside in this country, may now be compelled to be examined on oath, before a commissioner, and the witness is guilty of perjury if he give false evidence: (see 19 & 20 Vict. c. 113, ss. 1 to 6.)

Page 275, n. (3), add—But the court has discharged that part of the rule staying proceedings on the ground of unreasonable delay: (*Butler v. Fox*, 9 C. B. 199.)

Page 278, n. (1), add—*Williamson v. Page*, 1 C. B. 464.

Page 280, after the form of *mandamus* to examine, add—Where the *mandamus* issued to the “chief justice and other justices,” who were two, the chief justice and one *puisne* justice only took the evidence and it was held good: (*R. v. Douglas*, 13 Q. B. 42.) So, copies certified by the registrars of court who did not state they were copies, were held good: (*Ibid*.)

Page 283, n. (5), add—But where, in consequence of the plaintiff abandoning that part of his case to which the commission applied, the commission was not read, and the defendant succeeded on that issue, the defendant was held entitled to the costs of the commission: (*Jewell v. Parr*, 17 C. B. 636.)

Page 288, to second paragraph, add—The affidavit should state positively that the applicant is entitled, or grounds for his being so: (*Ex parte Cooke*, 5 D. & L. 413.)

Page 288, to end of third paragraph, add—Where the party alleges the document is lost, a judge cannot order that if such party does not produce the document to be stamped a copy duly stamped shall be read at the trial without objection, though the original be tendered: (*Rankin v. Hamilton*, 15 Q. B. 187.)

Page 291, n. (6), add—*Wright v. Morrey*, 11 Exch. 209.

Page 292, to end of first paragraph, add—Inspection of documents will be refused in an action not brought *bonâ fide*, but merely to obtain inspection with a view to aid another action: (*Temperley v. Willett*, 25 L. J. 259, Q. B.)

Page 292—Discovery will be refused if the party has already given an extract of the only documents he possesses, and has so informed the party applying: (*Bray v. Finch*, 1 H. & N. 468.)

Page 293, n. (14), add—See *Tetley v. Easton*, 18 C. B. 643.

Page 295, to n. (1), add—*Hewitt v. Webb*, 21st Nov. 1856, Q. B. ; *Bray v. Finch*, 21st Nov. 1856, Exch.

Page 296, to end of first paragraph, add—The affidavit must be made by a party to the cause: (*Herschfield v. Clarke*, 11 Exch. 712.)

Page 298 n. (4), add—*Herschfield v. Clarke*, 11 Exch. 712.

Page 298, n. (5), add—When inspection and an examination on interrogatories are ordered, and the orders are silent as to costs, the applicant, on obtaining the costs of the cause, cannot claim also the costs of these proceedings: (*Smith v. Great Western Railway Company*, 25 L. J. 279, Q. B.)

Page 298 n. (6), add—The party must apply promptly under this section: (*Chester v. Wortley*, 18 C. B. 289.)

Page 298, at foot of page, add—If the particulars are too general the plaintiff should apply for better particulars, and cannot rely on this objection being open at the trial: (*Hull v. Bollard*, 1 H. & N. 184.)

Page 302, n. (6), add—*Whyman v. Garth*, 8 Exch. 803.

Page 303, to middle of first line, add (note)—*Spooner v. Payne*, 4 C. B. 328.

Page 311, to end of second paragraph, add—It seems one of several defendants may make the suggestion though other defendants have moved for costs of the day: (*Bridgford v. Wiseman*, 16 M. & W. 489.)

Page 313, to end of first paragraph, add—Where plaintiff's former attorney had misconducted himself: (*Howards v. Croft*, 6 C. B. 620.)

Page 314, n. (8), add—Nor can the plaintiff, where the defendant has not had his special jurors present: (*Newton v. Chaplin*, 7 C. B. 774.)

Page 324, n. (3), add—*Brett v. Stone*, 1 D. & L. 140.

Page 333, n. (6), add—The defendant's counsel, after announcing his intention not to call evidence, and after the plaintiff's counsel thereon has summed up, cannot change his mind and call evidence: (*Darley v. Ouseley*, 2 Jur. N. S. 497, Exch.)

Page 374, n. (14), add—So, if the judge omit to tell the jury how to construe a written contract: (*Griffiths v. Rigby*, 25 L. J. 284, Exch.)

Page 375, n. (4), add—Or made strong observations on the arguments used by counsel in addressing the jury: (*Darby v. Ouseley*, 2 Jur. N. S. 497, Exch.)

Page 375, n. (8), add—But the judge ought not to reserve such a point: (*Siordet v. Kucynski*, 17 C. B. 251; *Tattersall v. Fearnley*, 17 C. B. 368.)

Page 376, n. (6), add—And no terms can be imposed at the defendant's instance: (*Turnley v. London and North Western Railway Company*, 16 C. B. 575.)

Page 381, n. (2)—So if the jury gave what is called a perverse verdict, which means, where there is no dispute as to facts but the jury, disregarding the direction of the judge as to the law, choose to take the matter into their own hands, and deal out what they think a rough sort of justice: (Per Jervis, C. J. *Hawkins v. Alder*, 18 C. B. 140)

Page 389, at end of first paragraph, add—If the action was for *crim. con.* the court will receive the affidavit of the defendant but not that of the plaintiff's wife: (*Hawker v. Seale*, 17 C. B. 595.)

Page 390, add to the end of the first paragraph—The rule is not affected by the Common Law Procedure Act, 1854, s. 44 (*ante*, p. 402): (*Hawkins v. Alder*, 18 C. B. 640.)

Page 396, n. (1), add—*Raphael v. Bank of England*, 17 C. B. 161.

Page 405, to end of first paragraph, add—On an appeal to the Exchequer Chamber against a refusal of a rule *nisi*, if a rule *nisi* is granted by the Exchequer Chamber, cause is to be shown in the first instance. A preliminary objection to the appeal should be raised when the cause is about to be shown. It is no objection to the appeal that the Court of Error is to draw inferences of fact as a jury would do: (*Kingsford v. Merry*, 29 Nov. 1856, Exch.)

Page 405, n. (5), add—To induce the court to give leave of appeal after the four days, not only must the delay be accounted for, but the court must be satisfied that if they had had originally a discretionary power to allow an appeal, they would have so allowed it: (*Watson v. Lane*, 25 L. J. 240, Exch.)

Page 419, n. (1).—This is altered by statute 19 & 20 Vict. c. 108, s. 49, *ante*, p. 1198, and in some cases a judgment of the County Court may be removed into the Superior Court; but no action can be brought on such judgment.

Page 419.—*Superior Court ordering trial before County Court judge.*] By 19 & 20 Vict. c. 108, s. 26, "where in any action of contract brought in a Superior Court, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into court, payment, an admitted set-off or otherwise, to a sum not exceeding 50*l.*, a judge of the Superior Court, on the application of either party, after issue joined, may in his discretion, and on such terms as he shall think fit, order that the cause be tried in any County Court which he shall name; and thereupon the plaintiff shall lodge with the registrar of such court, such order and this issue, and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise, by the registrar to both parties, or their attorneys, and after such hearing the

registrar shall certify the result to the Master's office of such Superior Court, and judgment in accordance with such certificate may be signed in such Superior Court."

Page 420. — WRIT OF TRIAL TO COUNTY COURT JUDGE. — Where any action under 19 & 20 Vict. c. 108, s. 26, is ordered to be tried in a County Court, the registrar of the County Court mentioned in the order shall enter the same in the minute book of the court for hearing on the day appointed by the judge of such court, and the same fee shall be taken for the hearing thereof as if a plaint in the action had been originally entered in the County Court: (Rule Pr. 65, Co. Cts, 1857.)

Page 422, at foot of text, add — The trial cannot take place after the writ of trial has expired, without re-sealing; and the writ cannot afterwards, by being resealed, make the trial good: (*Cox v. Norton*, 25 L. J. 248, Exch.)

Page 423, strike out the last sentence of the text, and substitute — A sheriff executing a writ of trial, has not the powers of amendment conferred by the Common Law Procedure Acts on judges sitting at Nisi Prius: (*Wickes v. Grove*, 2 Jur. N. S. 212, Exch.)

Page 423, to last line add — The record may be withdrawn: (*Shaw v. Owen*, 17 C. B. 524.)

Page 429, n. (3) add — The rule nisi must be drawn up on reading the affidavit: (*Sante v. Hicks*, 17 C. B. 523.)

Page 453, n. (1). — A judgment of a County Court can in some cases be removed to a Superior Court. If a judge of a Superior Court shall be satisfied that a party against whom judgment for an amount exceeding 20*l.* exclusive of costs, has been obtained in a County Court, has no goods or chattels which can be conveniently taken to satisfy such judgment, he may, if he shall think fit, and on such terms as to costs as he may direct, order a writ of *certiorari* to issue.

Page 455, n. (7), add — Under this section (13 & 14 Vict. c. 61, s. 11), in considering whether the action is for a *tort*, or on contract, the court look to the substance not to the form of the declaration; thus, a declaration against a carrier for negligence, is treated as for breach of contract: (*Legge v. Tucker*, 28 L. T. 145, Exch.)

Page 458, *Costs—County Courts.*] — The County Courts Amendment Act, 19 & 20 Vict. c. 108, has made the following alterations, which more or less directly affect the text: — Where the claim is reduced by set-off below 50*l.*, the County Court has jurisdiction: (s. 24.) Where title to any corporeal or incorporeal hereditament comes in question, the parties may by consent give jurisdiction: (s. 25.) Where an action of contract is brought in one of Her Majesty's Superior Courts of Record, to recover a sum not exceeding 20*l.* and the defendant in the action suffers judgment by default, the plaintiff shall recover no costs unless upon application to such court, or to a judge of one of the

Superior Courts, such court or judge shall otherwise direct. (a. 30.) Under this clause it is imperative on the judge to make an order for costs in all cases of concurrent jurisdiction: (*Heard v. Edey*, 28 L. T. 291, Exch.)

Page 460, n. (4), add—Where a carrier received parcels at U., for a railway company, the company was held not to carry on business at U., within 9 & 10 Vict. c. 95, s. 128 : (*Misor v. London and North Western Railway Company*, 26 L. J. 39, C. P.)

Page 461, at the end of the first paragraph, add—And the time for showing cause against a rule for the suggestion, will not be enlarged to allow the plaintiff to apply to the judge for a certificate: (*Ward v. Cardwell*, 18 C. B. 639.)

Page 463, n. (3), add—So generally, where the plaintiff seeks to recover on money counts a sum above 20*l.*, but which is reduced by a plea of set-off to less, the lower scale applies: (*Tonge v. Chadwicks*, 5 E. & B. 950.)

Page 476, n. (1), add—*Harrison v. Bush*, 5 E. & B. 358.

Page 476, n. (2), add—See also *Jewell v. Parr*, 17 C. B. 636.

Page 500, n. (4), add—And unless the ground was specifically stated to the Master: (*Hore v. Saxl*, 17 C. B. 599.)

Page 502, n. (5), add—But a party may set off one judgment against another though the opposite party's attorney had purchased his client's interest on the verdict before judgment signed : (*Simpson v. Lamb*, 13 Jan. 1857, Q. B.)

Page 526, add—*In what cases, error lies.*—Where the parties by their counsel verbally consented to try the cause without a jury before a commissioner of Nisi Prius, who was not a judge of the Superior Courts, and the judge sitting at Nisi Prius verbally sanctioned such arrangement, it was held that the want of a judge's order, and a written consent, as required by the 1st section of the Common Law Procedure Act, 1854, was no ground of error : (*Andrews v. Elliott*, 25 L. J. 336, Q. B.)

Page 562—*Form of writs of execution in actions for breach of contract to deliver specific goods.*—By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 2, it is enacted, that "in all actions and suits in any of the Superior Courts of Common Law in Westminster or Dublin, or in any Court of Record in England, Wales, or Ireland, for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the nondelivery of which the plaintiff is entitled to recover, and which remain undelivered: what (if any), is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages,

(if any), the plaintiff would have sustained if the goods should be delivered under execution, as hereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the court, or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum, if any, as shall have been found to be payable by the plaintiff as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed; and such writ of execution may be for the delivery of such goods; and if such goods so ordered to be delivered, or any part thereof cannot be found, and unless the court, or such judge or baron as aforesaid, shall otherwise order, the sheriff, or other officer of such court of record shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, or within the jurisdiction of such court of record till the defendant deliver such goods, or at the option of the plaintiff, cause to be made of the defendant's goods, the assessed value or damages, or a due proportion thereof; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods, the damages, costs, and interest in such action or suit."

Page 568, n. (7), add—Where under a *fi. fa.* goods have been seized and then abandoned, a *ca. sa.* cannot be sued out till the *fi. fa.* has been returned: (*Andrews v. Sanderson*, 28 L. T. 293, Exch.)

Page 568, add—*From what time writs bind property.*]—By the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1, it is enacted, that "no writ of *fi. fa.*, or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bonâ fide*, and for a valuable consideration, before the actual seizure or attachment thereof by virtue of such writ; provided that such person had not, at the time when he acquired such title, notice that such writ, or any other writ, by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner."

Page 575—*Whose property may be taken in execution.*]—By the 17 & 18 Vict. c. 36, s. 1, it is enacted that "every bill of sale of personal chattels made after the passing of this act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale, or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be thereto annexed, or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or, in case the same shall be made or given by any person under or in the execution of any pro-

cess, then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench, within twenty-one days after the making or giving such bill of sale (in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed), otherwise such bill of sale shall, as against all assignees of the estate and effects of the person whose goods or any of them are comprised in such bill of sale under the laws relating to bankruptcy or insolvency, or under any assignment for the benefit of the creditors of such person, and as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any court of law or equity, authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void, to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale, or of any person against whom the process shall have issued under, or in the execution of which such bill of sale shall have been made or given, as the case may be:" (see *Allen v. Thompson*, 1 H. & N. 15; *Re O'Connor*, 27 L. T. 27; *Ex parte Ashley*, 2 Bank. & Insol. R. 124; *Re Wright*, 27 L. T. 192; *Whitmore v. Empeon*, 28 L. T. 300; *Waterfall v. Penistone*, 27 L. T. 252.)

Page 577. *Priority of writs of execution.*]—By the 19 & 20 Vict. c. 101, s. 47, "when a writ against the goods of a party has issued from a Superior Court, and a warrant against the goods of the same party has issued from a County Court, the right to the goods seized shall be determined by the priority of the time of the delivery of the writ to the sheriff to be executed, or of the application to the registrar for the issue of the warrant to be executed; and the sheriff, on demand, shall, by writing signed by any clerk in the office of the under-sheriff, inform the high bailiff, on demand, of the precise time of such delivery of the writ, and the bailiff, on demand, shall show his warrant to any sheriff's officer, and such writing purporting to be so signed, and the indorsement on the warrant, shall respectively be sufficient justification to any high bailiff or sheriff acting thereon."

Page 598, n. (4), add—Though a relaxation of custody by the sheriff without the judgment creditor's consent is a discharge of the debtor, yet, if both creditor and prisoner consent that it shall be no discharge, the prisoner is estopped from claiming a discharge on that ground. The sheriff, in such a case, for his own safety, should obtain a rule of court : (*Haines v. East India Company*, 28 L. T. 165.)

Page 618, to first paragraph, add—An attachment of a judgment debt overrides the attorney's lien for general costs on such judgment: (*Hough v. Edwards*, 26 L. J. 54, Exch.)

Page 618, n. (1), add—Attachment of Debts, *Jones v. East India Company*, 25 L. J. 154, C. P.

Page 629, add—As to entering satisfaction on judgments for debts which have been satisfied under proceedings in the Insolvent Debtors' Court see *Sturgis v. Joy*, 2 E. & B. 739.

Page 649, n. (1), add—The court will discharge a married woman taken under a *ca. sa.* if she has no separate property, whether she be taken separately from or together with her husband: (*Ivens v. Butler*, 15 Jan. 1857, Q. B.)

Page 656, n. (2), add—The court will not exempt an administrator plaintiff from costs under 3 & 4 Will. 4, c. 42, s. 31, if the verdict be against him, unless the defendant has been guilty of falsehood or misconduct: (*Redmayne v. Moon*, 25 L. J. 311, Q. B.)

Page 677, n. (2), add—What is reasonable and probable cause is not for the jury exclusively, but the court will look to all the circumstances: (*Gilbert v. Crozier*, 28 L. T. 288, C. P.)

Page 694, n. (3), add—A *sequestrari facias* may issue against a defendant after he has obtained an interim order for protection under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96: (*Parry v. Jones*, 26 L. J. 36, C. P.)

Pages 737, 758. *Joint Stock Companies Act*, 1856, 19 & 20 Vict. c. 47.]—The proceeding against shareholders by *scire facias* or issuing execution is inapplicable as regards companies under this act, and the only provisions requiring to be noticed here are as follow:—

Service of summons, notice, &c. on company.]—Any summons or notice requiring to be served upon the company, may, except in cases where a particular mode of service is directed, be served by leaving the same, or sending it through the post, addressed to the company, at their registered office, or by giving it to any director, secretary, or other principal officer of the company: (s. 53.)

Rule as to notices by letter.]—Notices by letter shall be posted in such time as to admit of the letter being delivered in the due course of delivery within the period (if any), prescribed for the giving of such notice; and in proving such service, it shall be sufficient to prove that such notice was properly directed, and that it was put into the post-office at such time as aforesaid: (s. 54.)

Authentication of notices by the company.]—Any summons, notice writ, or proceeding, requiring authentication by the company, may be signed by any director, secretary, or other authorized officer of the company, and need not be under the common seal of the company, and the same may be in writing or in print, or partly in writing and partly in print: (s. 55.)

Contracts how made by company.—(1) Any contract which, if made between private persons, would be by law required to be in writing, and if made according to English law to be under seal, may be made on behalf of the company in writing under the common seal of the company, and such contract may be in the same manner varied or discharged. (2) Any contract which, if made between private persons, would be by law required to be in writing, and signed by the parties to be charged therewith, may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company, and such contract may in the same manner be varied or discharged. (3) Any contract which, if made between private persons, would be by law valid, although made by parol only, and not reduced into writing, may be made by parol on behalf of the company, by any person acting under the express or implied authority of the company, and such contract may in the same way be varied or discharged, and all contracts made according to the provisions herein contained shall be effectual in law, and shall be binding upon the company and their successors, and all other parties thereto, their heirs, executors, or administrators, as the case may be: (s. 41.)

Attachments, sequestrations, and executions, within three months before petition for winding-up to be void.—If any attachment, sequestration, or execution, is issued against any company, by virtue whereof the estate and effects of the company, or any of them, may be attached, sequestered, or taken in execution at any time within three months next before the filing or presentation of the petition for winding-up the company, such attachment, sequestration, or taking in execution, shall be void in favour of the liquidators of the company, as against the attaching, sequestrating, or execution creditor, whether the same has been completely executed or not, except that such creditor shall, if the attachment, sequestration or execution would have been valid but for this provision, be entitled to retain out of any money already realized his costs of suit, and of the attachment, sequestration or execution, or to proceed with the attachment, sequestration, or execution, for the purpose of realizing such costs, but on satisfaction of such costs, or on tender of the amount thereof by the liquidators to the creditor, it shall be lawful for the liquidators to recover from such creditor the property so attached, sequestered, and taken in execution, and the proceeds of such property, or the residue thereof, as the case may be: (s. 80.)

Page 737.—After the date of the order to wind-up the company all suits and actions against the company, if the Court of Bankruptcy so orders, shall be stayed: (s. 73.) So after the presentation of a petition to wind-up, any creditor or contributory may apply for an injunction to restrain actions against the company: (s. 84). The official liquidators in winding-up, the company have power, with the sanction of the court, to sue or defend in the name of the company: (s. 90.)

Page 740, n. 1, add—"The court will allow execution against a former shareholder, without showing that the creditor has used due

diligence to recover from a present shareholder:" (*Hill v. London and County Assurance Company*, 5 Nov. 1856, Q. B.)

Page 740, n. (2), add—As to what is due diligence: (see *King v. Parental Assurance Company*, 11 Exch. 443; *Ridgway v. Security Assurance Society*, 18 C. B. 686.)

Page 741, n. (2), add—A judge at chambers, though not a judge of the court in which judgment was obtained against the company, has power to order execution to issue against a shareholder: (*Palmer v. Justice Assurance Society*, 20th Nov. 1856, Q. B.)

Page 747, n. (4), add—But if it clearly appear by the affidavit that the company have no funds whatever, due diligence need not be shown: (*Nixon v. Kilkenny Railway Company*, 1 H. & N. 47.)

Page 747, n. (1), add—The shareholder against whom execution is sought, must be shown to have signed the deed of settlement, not merely to have acted as a director: (*Moss v. Steam Gondola Company*, 17 C. B. 180.)

Page 747, n. 4, add—"But it is no answer to the declaration in *sci. fa.*, that writs of *sci. fa.* have been issued and are pending against other shareholders:" (*Nixon v. Brownlow*, 1 H. & N. 405.)

Page 751, add—It is no answer to the application for execution against a shareholder of a joint-stock bank under 7 & 8 Vict. c. 113, that the shareholder was induced by fraud to take the shares, he having remained a shareholder for some time and received dividends: (*Henderson v. Royal British Bank*, 28 L. T. 286, Q. B.)

Page 751, add to fourth line from the bottom, under the 7 & 8 Vict. c. 113, ss. 10, 13—"The creditor has an absolute right to execution against the shareholder, if the court see that there could be no answer to a *sci. fa.* against the shareholder:" and personal service of the ten days notice is not necessary: (*Morrisse v. Royal British Bank*, 1 C. B. (N. S.) 67.)

Page 760, n. 8, add—Where an order to wind-up the company has been made, the creditor will obtain leave to issue execution against the shareholder if he can show that there is no reasonable prospect of his being able soon to obtain satisfaction under the winding-up process:" (*Palmer v. Justice Assurance Company*, 20 Nov. 1856, Q. B.)

So where no official manager has been appointed, and therefore the debt cannot be proved, the creditor is not prevented from obtaining leave to issue execution:" (*Hill v. London and County Assurance Company*, 5 Nov. 1856, Exch.)

Page 780, n. (6), add—But not to debts contracted since the bankruptcy: (*Grace v. Bishop*, 11 Exch. 424.)

Page 781, n. (1) & (2)—See now 19 & 20 Vict. c. 79.

Page 794, n. (2), add—*Stammers v. Hughes*, 18 C. B. 527.

Page 874, n. (4), add—The court will change the venue on the com-

mon affidavit in actions for use and occupation: (*Smith v. O'Brien*, 18 Nov. 1856, Exch.)

Page 902, n. (9), add—But in the Court of Exchequer it seems in cross demurrers the party first demurring is entitled to begin: (*Hill v. Cowdery*, 1 H. & N. 362.)

Page 904, at the end of the first paragraph, add—Where two pleas are demurred to, and the demurrer fails as to one, and the defendant elects to amend the other, the only rule the court can pronounce is a rule for the defendant to be at liberty to amend: (*Pianciani v. London and South Western Railway Company*, 18 C. B. 226.)

Page 912, n. (2), add—The court refused to allow money paid into court in lieu of special bail to be deemed paid in under a plea of payment without the plaintiff's consent: (*Clelland v. Moody*, 28 L. T. 289, C. P.)

Page 921, n. (1), add—So, where the interpleader issue will raise a different question from that between the original parties: (*Baker v. Bank of Australia*, 28 L. T. 288, C. 1'.)

Page 923, n. (13), add—And where there are mixed witnesses, the correct rule is to see which party has substantially succeeded, without reference to whether he is plaintiff or defendant: (*Davis v. Clifton*, 25 L. J. 344, Q. B.)

Page 930, n. (12), add *Cusel v. Judah*, 7 M. & Gr. 527.

Page 998, at the end of the first form of indorsement add—If the name of the maker of the note is omitted, it is an irregularity, but the court will, on a motion to set aside the copy and service, allow the writ and copy to be amended under the Common Law Procedure Act, 1852, s. 20: (*Knight v. Pocock*, 17 C. B. 177.)

Page 1000, to text, add—Under this clause a judge has no power to stay the action until the plaintiff give an indemnity against the lost bill, the defendant undertaking to pay the debt and costs: (*Arunguren v. Scholfield*, 1 H. & N. 494.)

Page 1042, n. (4), add—In an action by an administrator the court will not stay proceedings till an alleged will which is in the hands of a party abroad is brought to this country: (*Prosser v. Wagner*, 25 Nov. 1857, C. P.)

Page 1044, n. (4), add—Where a defendant takes out a summons to stay proceedings on payment of an admitted debt, which the plaintiff declines to receive, claiming more, in order to disentitle the latter to the costs of the cause, the defendant must bring the money into court: (*Hore v. Saxl*, 17 C. B. 599.)

Page 1045, n. (6), add—The rule as to staying proceedings till the costs of a former action are paid is generally confined to actions of ejectment: (*Danvers v. Morgan*, 17 C. B. 530.)

Page 1047, n. (2), add—In such an application the plaintiff should be made a party to the rule: (*Thatcher v. D'Aguilar*, 11 Exch. 436.)

Page 1048, n. (1), add—A court of law will stay proceedings in an action brought in disobedience of an order of the Court of Chancery, though no writ of injunction has actually issued: (*Cobbett v. Ludlam*, 11 Exch. 446.)

Page 1080, to first paragraph, add—Where the declaration in an action for libel stated only the substance of the libel, the judge rightly amended it by inserting before that part the letter containing the libel, after the words “meaning thereby:” (*Saunders v. Bate*, 1 H. & N. 402.)

Page 1080, n. (6), add—See, where an amendment was refused as not being necessary to determine the question in controversy: (*Cawkwell v. Russell*, 26 L. J. 34, Exch.)

Page 1099, n. (1), add—This section does not give the court power to grant a rule absolute in the first instance to examine a witness *in extremis* with a view to a trial: (*Thomas v. Stutterheim*, 3 Nov. 1856, Q. B.)

Page 1109, n. (4), add—See as to a party arriving to attend a judge's summons a few minutes too late: (*Moyse v. Dingle*, 23 L. J. 305, Q. B.)

Page 1115, add to text—The court will not rescind a judge's order if right at the time, merely because of an event which has subsequently happened: (*Borradaile v. Nelson*, 14 C. B. 655.)

Page 1119, n. (9), add—See *Fisher v. Coffey*, 1 Jur. N. S. 856.

Page 1138, to first paragraph, add—Where one judge differs from the others on the subject, the court will not make absolute a rule for an attachment: (*Swinfen v. Swinfen*, 12 Jan. 1857, C. P.)

Page 1140, n. (7), add—So is a certificate of protection under the Debtor and Creditors Arrangement Act, 7 & 8 Vict. c. 70, s. 6: (*Re Slater*, 28 L. T. 286, Q. B.)

Page 1145, n. (3), add—To bring a case within this section it is enough that there is a matter in dispute between the parties which they have agreed to refer, though the action has been brought in respect of some claim arising out of the same contract which was not strictly disputed: (*Russell v. Pellegrini*, 21 Nov. 1856, Q. B.)

Page 1149, n. (5), add—(*Morgan v. Tarte*, 11 Exch. 82.)

Page 1176, n. (4), add—In general where a verdict is taken at *Nisi Prius* subject to a reference, the successful party may sign judgment though the time for moving to set aside the award has not elapsed: (*O'Toole v. Potts*, 14 Jan. 1857, Q. B.)

Page 1191, to end of first paragraph, add—“A defendant intending to avail himself of the power given by sect. 39 of 19 & 20 Vict. c. 108, to object to an action being tried in the County Court, shall give notice personally, or by post, of such intention to the registrar and to the plaintiff, five clear days before the return day of the summons,

according to the form set forth in the schedule, and shall therein name the parties whom he proposes to be his sureties, or state therein his willingness to deposit money in lieu of giving surety ; and if he shall fail to give such security or make such deposit before the return day, or shall fail to give such notice of his intention to object as aforesaid, he shall not be entitled to object to the action being tried in the County Court:" (Rule Pr. 60, Co. Cts. 1857.)

Page 1201, n. (7)—This (Co. Cts.) rule is now numbered 139, but is in substance unchanged.

Page 1201, n. (8)—This rule is now numbered 140.

Page 1201, n. (9)—Now rule 141 ; for " clerk " read registrar.

Page 1202, n. (2)—Now rule 142, for " clerk " read registrar.

Page 1202, n. (3)—Now rule 143, for " clerk " read registrar.

Page 1202, n. (3)—Strike out the first paragraph and substitute *Security on appeal from County Courts.*]—"In all cases where a party proposes to give a bond by way of security, he shall serve, by post or otherwise, on the opposite party, and the registrar at his office, notice of the proposed sureties in the form set forth in the schedule ; and the registrar shall forthwith give notice to both parties of the day and hour on which he proposes that the bond shall be executed, and shall state in the notice to the obligee that, should he have any valid objection to make to the sureties, or either of them, it must then be made: (Rule Pr. 134, Co. Cts. 1857.)

The sureties shall make an affidavit of their sufficiency before the registrar in the form in the schedule, unless the opposite party shall dispense with such affidavit: (Rule Pr. 135 : *Ibid.*)

The bond shall be executed in the presence of the judge or registrar, or some other of the persons mentioned in sect. 58 of 19 & 20 Vict. c. 108 ; provided always, that if it be executed in the presence of the judge or registrar it shall not be necessary for it to be attested : (Rule Pr. 136 ; *Ibid.*)

Where a party makes a deposit of money in lieu of giving a bond, he shall forthwith give notice to the opposite party, by post or otherwise, of such deposit having been made: (Rule Pr. 137 ; *Ibid.*)

In all cases where the security is by bond the bond shall be deposited with the registrar until the cause be finally disposed of : (Rule Pr. 138 ; *Ibid.*)

Page 1204, nn. (1), (2), (4)—Strike out and substitute the following rules slightly altered:—"All cases on appeal shall, unless the judge shall otherwise order, be presented to him for signature at the court holden next after the expiration of twelve clear days from the day on which judgment was pronounced, and shall then be signed by the judge and be sealed with the seal of the court ; and when signed and sealed one copy thereof shall be deposited with the registrar and another sent, by post or otherwise, by the appellant to the successful

party within three clear days next after the time of signing and sealing the same. And if the appellant do not comply with this rule the successful party may proceed on the judgment unless the judge shall otherwise order:" (Rule Pr. 145, Co. Cts. 1857.)

Page 1204, n. (2)—Now rule 146.

Page 1204, n. (4)—Now rule 147.

Page 1205, n. (12)—Now rule 148, for "clerk" read registrar.

Page 1206, n. (1)—Now rule 149.

Page 1206, n. (2)—Now rule 150.

Page 1217, in tenth line from top, after "B. A.," insert "within six years or the degree of LL.B."

Page 1248, add—See also an instance of an attorney's negligence in suing in a local court unable to do justice : (*Cox v. Leach*, 14 Jan. 1857, C. P.)

Page 1250, add—Special circumstances must be shown under 6 & 7 Vict. c. 73, s. 37, to enable the court to order taxation of an attorney's bill of costs after a year from its delivery, even though an action has been brought on the bill : (*Cowdell v. Neale*, 26 L. J. 37, C. P.)

Page 1261, n. (8),—The judgment debt may be attached notwithstanding the attorney's lien : (*Hough v. Edwards*, 26 L. J. 54, Exch.)

Page 1261, n. (13), add—It is against public policy for an attorney to purchase his client's interest in a verdict in an action which he conducted as such attorney : (*Simpson v. Lamb*, 13 Jan. 1857, Q. B.)

Page 1263, n. (3), add—So the court refused to compel an attorney to pay over money recovered in an action brought in the name of C., who, however, during the action, repudiated liability for costs on the ground that a third party was liable : (*Re Marshall*, 13 Jan. 1857, Q. B.)

Page 1267, n. 10, add—*Re Collins*, 18 C. B. 272.

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